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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 94

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS,

vs.

STORER BROADCASTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MAY 23, 1955
CERTIORARI GRANTED OCTOBER 10, 1955

SUPREME COURT OF THE UNITED STATES

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1-15-45

Before the

Federal Communications Commission

Washington, D. C.

Docket No. 8967

In the Matter of The Amendment of Sections 3.35, 3.240, and 3.640 of the Rules and Regulations relating to Multiple Ownership of AM, FM and Television Broadcast Stations.

RESPONSE TO NOTICE OF PROPOSED RULE MAKING AND REQUEST FOR ORAL ARGUMENT—September 27, 1948

Come now Paramount Pictures, Inc., Balaban and Katz Corporation, Paramount Television Productions, Inc., New England Theaters, Inc., United Detroit Theaters Corporation, and Gulf Theaters, Inc., hereafter referred to collectively as "Respondents" and respectfully represent to the Commission as follows:

1. No power to make and promulgate the proposed regulation is conferred upon the Commission by Sections 303(r), 311, 313 and 314 of the Communications Act of 1934, as amended or otherwise; on the contrary the Commission is expressly prohibited from taking such action by section 9(a) of the Administrative Procedure Act (5 U.S.C. 1008(a)). The imposition by regulation of a numerical limitation on the number of broadcast stations which can be owned and operated by any person without regard to areas and populations served is, in a legal sense, arbitrary and capricious and repugnant to the general statutory standard established by the Communications Act.

2. In the event that the Commission concludes that it has authority to promulgate the rule now proposed it should not, as a matter of policy, now limit to five the maximum number of commercial television broadcasting stations which can be owned and operated by any person. Neither the Commission's allocation policies nor the public acceptance and support of commercial television broadcasting service has now advanced to a point where such a limitation is either necessary or desirable.

46 Before the

Federal Communications Commission

Washington, D. C.

[Title omitted]

STATEMENT OF OBJECTIONS—September 27, 1948

The following statement, filed pursuant to paragraph 4 of the Commission's Notice of Proposed Rule Making in the above-styled matter released August 19, 1948, is submitted for the Commission's consideration in opposition to the adoption of paragraph (a)(3) beginning with the third sentence of the said paragraph and paragraph (b) of the Multiple Ownership Rule proposed in the Notice of Proposed Rule Making.

I

The portion of the proposed Rule which begins, "The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, * * *", and thereafter lists a maximum number of AM, FM and TV stations which may be controlled by one person or group of persons, is contrary to the letter, spirit and purpose of the Communications Act of 1934. Congress delegated to the Commission the duty of exercising its judgment on each application for broadcast facilities coming before it to determine whether the applicant possesses certain "statutory" qualifications and whether a grant of the application would serve the public interest, convenience and necessity. To insure the observance of this duty, Congress specifically required that no application could be denied without a full and fair hearing. Past Commission action and decisions, as well as the first part of the proposed Rule in the instant proceeding, recognize that, with respect to "concentration of control", each application must be decided on the merits of the individual cases before
47 it. Thus, in *In re Applications of Lubbock County Broadcasting Co. and Plains Radio Broadcasting Co. (KFYO), Lubbock, Texas* (Dockets No. 7334 and 7335), 4 RR 493, the Commission said in paragraph 15: "We have consistently decided each case involving multiple ownership on its own merits, considering all pertinent factors." The portion of the proposed Rule herein considered represents a departure from this policy in that the Commission proposes to state definitely at this time that applications for broadcast facilities by persons whose broadcast interests have reached the maxima set forth in the proposed Rule will not be judged by the Commission on all the facts of each case but will be summarily and routinely denied or dismissed because the sched-

ple of maximum of station interests permissible under the proposed Rule would be exceeded by a grant of such applications.

The aforesaid provision of the proposed Rule represents an attempted abdication by the Commission of its statutory duty to exercise its administrative discretion on the merits of each application before it. This characterization is not true only if it is assumed that the Commission can now foresee all of the permutations and combinations of circumstances with respect to multiple ownership which may arise and be presented to the Commission in future applications. Such assumed omniscience and prescience might enable the Commission to say that, when the limits of multiple ownership stated in the proposed Rule have been attained, the public interest could never be served by licensing broadcast facilities to a person whose broadcast interests meet the maximum limits stated. The inability of the Commission in the past, along with all other qualified experts in the field of radio broadcasting, to forecast with any degree of accuracy the future developments in AM, FM, and TV broadcasting, should in itself serve to show that the Commission cannot now undertake rigidly to limit its perspective on multiple ownership at arbitrary points with any assurance that it has considered all aspects of the problem—which exist now or which may arise in the future. It also seems clear that whenever any substantive problem or policy question can be solved by the adoption of a rigid rule it is no longer a problem for a flexible administrative agency but one which should be solved by statutory promulgation. It is also axiomatic that Congress alone has the power to declare that there is no longer any need for the exercise of administrative discretion with respect to a particular problem, and Congress has not done so as long as the standard of public interest, convenience, and necessity remains in the statute. The Commission cannot detract from its administrative obligations any more than it can add to its administrative powers.

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II

The foregoing argument is in itself sufficient reason for not adopting the portion of the proposed Rule with respect to which objection is raised. The soundness of the argument can, however, be substantiated effectively by the statement of a few situations with which the Commission might well be faced if the proposed Rule were adopted. In accord with the burden of the preceding argument it should be remembered, however, that the following examples are not offered and should not be considered as the products of an exhaustive investigation of the multiple ownership problem such as to exclude the possibility of many other unstated situations equally or more vexing.

a. Conflict with Section 307(b) of the Communications Act.

Section 307 (b) of the Communications Act states:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

It is well established and recognized in decisions of the Commission that this Congressional mandate means that, if applicant A applies for broadcast facilities in community A which are mutually
49 conflicting with an application by B for community B, all other things being equal, the application for the town with inferior broadcast service will be granted. Suppose, now, that applicant A owns seven AM broadcast stations whereas B is a newcomer to radio broadcasting, but that town A is clearly inferior to town B with respect both to transmission and reception of standard broadcast services. Applicant A would be preferred to applicant B if the consideration of multiple ownership were excluded. Would or could the Commission legally disregard the Congressional mandate of Section 307(b) because the application of A violated the proposed multiple ownership Rule formulated by the Commission? It is submitted that it could not.

Again, suppose that an applicant for broadcast facilities in a community where there is a demonstrated demand for broadcast facilities of the type sought is not opposed by a competing applicant, that the application conforms to the requirements of the Communications Act and of the Commission's Rules and Standards in all respects, excluding the proposed multiple ownership Rule. Would or could the Commission legally deny the application in the face of the provision of Section 307(b) that "* * * when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, * * *". It is submitted that it could not.

b. Conflict with Policy of Promoting Competition.

Suppose that there is only one broadcast station of any type located in a given community and that a person who owns the maximum number of such stations permitted by the proposed Rule applies for a station of the same type in the same community. Can the Commission state now, without looking at all the facts of the case, that a grant of the application which would provide the first competing broadcast service in the community, could not under any

circumstances better serve the public interest than a denial of the application on the grounds of multiple ownership? Bearing in mind that the present multiple ownership Rule (Section 3.35) has as its *raison d'etre* the preservation and stimulation of competition among broadcast stations (See Decision in *Hugh O. Jones, et al tr/as WGCM Broadcasting Co., Biloxi, Mississippi*, (Docket No. 6881, 3 RR 956) and that a denial of the application in the instant hypothetical case would promote monopoly, it is submitted that the Commission cannot now undertake in advance to deny such an application without regard to the particular facts.

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c. Conflict with General Duty to Provide Broadcast Service to Public.

Suppose that there is no station in a community utilizing the type of broadcast facilities sought by a person whose other broadcast interests have attained the maxima stated in the proposed Rule and suppose further that there is a great demand in the community for the operation of such a station but that no other applicant has come forward. Can the Commission now state, without forehanded knowledge of all the facts bearing on the demand and its fulfillment, that the public interest would be better served by denying such an applicant and community of the facilities requested, under the provisions of the proposed Rule, than by a grant of the application? Without reference to the legal argument made in the discussion *supra* with respect to Section 307(b) of the Communications Act in a similar situation, it is apparent that a summary and predetermined denial or dismissal of such an application is contrary to logic, the principle of reasonableness, the standard of public interest, convenience, and necessity, and the general duty of the Commission to allow broadcast service to be provided for all the citizens of the country.

d. Conflict with General Purpose of Comparative Consideration of Competing Applications.

Suppose that, of two mutually exclusive applicants, applicant A already possesses the maximum number of broadcast interests listed in the proposed Rule and that applicant B has not. Suppose further that, while A and B are both legally qualified applicants, A proposes to render a superior broadcast service while B proposes to render a marginal service. Can the Commission now state that the public interest would be better served by denial of A's application and a grant of B's application irrespective of any facts which might be presented with respect to the needs of the listening audience, the disparity between the proposed services, and the methods and practices employed by A in conducting the affairs of the other

stations which he controls? It is submitted that the Commission cannot legally condemn the potential audience to inferior service in so cavalier a manner and term the result to be "in the public interest."

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III

The specific numbers selected by the Commission in stating the absolute limitation on multiple ownership in AM, FM and TV broadcasting are completely arbitrary and bear no reasonable relation to the object desired to be accomplished. Nowhere has the Commission indicated the basis for selecting the limitations of 7, 6 and 5 for multiple ownership of AM, FM and TV stations respectively. It is submitted that the present opportunity to oppose the adoption of the proposed Rule is meaningless until and unless the Commission states the basis of its choice of numerical limits and without a statement of such basic reasons, it appears that the procedural requirements of Sections 4(a) and 4(b) of the Administrative Procedure Act have not been complied with by the subject Notice of Proposed Rule Making in respect of the specific limits proposed to be imposed.

Nor has the Commission stated the general purpose of curtailing "concentration of control" except in situations involving overlap of service areas and the resultant possibility of reduced competition. It seems probable, however, that the proposed Rule is concerned with either programs and/or the ability of persons controlling several stations to bargain coercively with respect to goods and services in the field of broadcasting. If these suppositions are correct, the arbitrary limitations of the proposed Rule appear to be inept and unlikely to correct the supposed abuse. What combination of eight AM stations, seven FM stations, or six TV stations could approach the control of programs exercised by the large networks? Indeed, the disparity is so great as to raise the question of equal application of the law, or at least of ordinary fairness and equality of treatment of all persons. As for the coercive powers which the Commission may feel accompany multiple ownership, is it not true that the owner of two or three stations can engage in such practices while the owner of seven stations may not? Is there any reason to a rule which says

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that an application for broadcast facilities by a person who owns six AM stations will be judged with respect to "concentration of control" on the facts of the particular case whereas an application by a person owning seven AM stations will "in any event" not be evaluated on the facts but will be condemned as seeking to attain "concentration of control contrary to the public interest, convenience or necessity * * *"? Until the Commission can produce facts in support of its proposed Rule the im-

position of specific limitations must be considered arbitrary and capricious.

The flaws in the proposed Rule described above cannot be ameliorated by permitting the amendment or waiver of the proposed Rule. Such exceptional devices place an unconscionable burden of proof on an applicant to refute a rule which may not have any reasonable basis and would therefore be as difficult to refute as to support. Perhaps even more important, the mere adoption of the proposed Rule would be a deterrent to the filing of applications for broadcast facilities which might serve the public interest even though the Commission would be willing to consider amendment or waiver of the Rule.

IV

It appears from the proposed Rule itself that any limitation on interests "less Than Control" are arbitrary restrictions on investments beyond the scope of the Commission's authority. By definition, "The Word 'control' as used herein is not limited to majority stock ownership but includes actual working control in whatever manner exercised." (Footnote 1 of Appendix to subject Note of Proposed Rule Making.) The portion of the proposed Rule concerned with "the Maximum Number of Stations with Interest less Than Control" must, therefore, be irrelevant to whatever purpose the Commission has in attempting to curtail "concentration of control", since such minority interests cannot affect control. In this respect, the adoption of the proposed Rule would 53-59 be beyond the scope of the Commission's delegated statutory authority.

V

The difference between the position taken in this statement and the position exemplified by the proposed Rule is another facet of the old and recurring argument concerning the proper measures for control of the *possibility* of abuse of power. At one time the cliche, "The power to tax is the power to destroy" held full sway over American Jurisprudence—only to be shattered by the more pithy epigram, "The power to tax is not the power to destroy while this court sits".[1] The analogy is obvious. The Commission is evidently concerned at the possibilities of injury to the public interest which might be caused by excessive "concentration of control" over broadcast facilities—in other words, at the possibilities of abuse of whatever power accrues in the broadcasting world through ownership of many stations. But abuse of such power, not the possibility of abuse, is the danger to be feared

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[1] Mr. Justice Holmes in *Panhandle Oil Co.* v. *Mississippi Ex. Rel. Knox* (1928) 277 U. S. 218, 223.

and controlled. The proper solution to the problem can be summed up by paraphrasing the remark of Mr. Justice Holmes and declaring, "Not while this commission sits." Let the Commission strike at the substance of abuses to the public interest rather than at their shadows which can grow shorter and disappear as well as lengthen and grow darker. The process of case to case decision, though more tedious, rather than the simpler method of regulation by restriction, would better serve to prevent such abuses as the Commission may have in mind.

Respectfully submitted,

ARTHUR W. SCHARFELD.

752 National Press Building
Washington, D. C.
September 27, 1948

* * * * * * * * *

60 Before the Federal Communications Commission

Washington, D. C.

[Title omitted]

A STATEMENT BY THE FORT INDUSTRY COMPANY AND ITS SUBSIDIARIES CONCERNING THE PROPOSED AMENDMENT OF SECTIONS 3.35, 3.240 AND 3.640—September 27, 1948

The Fort Industry Company, on its own behalf and on behalf of its subsidiaries, namely, West Virginia Broadcasting Corporation, Monongahela Valley Broadcastnig Company, Liberty Broadcasting Corporation and Detroit Broadcasting Company, files this statement concerning the proposed amendment of Sections 3.35, 3.240 and 3.640 of the Rules and Regulations and gives notice of its intention to appear in the above proceeding in the event that a public hearing is held on the matter.

I

The Fort Industry Company and its subsidiaries, hereinafter referred to as The Fort Industry Company, are of the opinon that the proposed amendments should not be adopted in the form set forth.

II

The proposed amendments contemplate limiting any person who either directly or indirectly owns, operates or controls seven standard broadcast stations to the ownership, operation or control of six FM broadcast stations and five Television broadcast stations

(Section 3.35 (a) (3) as proposed). In those cases where the licensee owns fewer than seven standard broadcast stations, the corresponding ownership of FM and Television stations is proportionately reduced. The basis for the proposed limitations is that otherwise there would exist a concentration of control contrary to the public interest, convenience and necessity.

III

The Fort Industry Company considers that public interest, convenience and necessity would be served best if the proposed amendments permitted the ownership of the same number of FM 61-125 stations and Television stations as standard broadcast stations. In other words, a person should have the opportunity to own, operate or control the same number of FM stations and the same number of Television stations as the number of standard broadcast stations which that person directly or indirectly owns, operates or controls.

IV

The proposed limitation on the ownership of FM and television stations is not practical. It will result in multiple owners of standard broadcast stations being prevented and barred from progressing with the art in so far as FM and Televison are concerned. The Commission should be aware of the fact that, among the radio broadcasting industry, it is not considered unlikely that FM and Television broadcasting could and may ultimately occupy a more prominent position than standard broadcasting in the field of radio broadcasting. If and when such a condition should exist, the proposed amendments, if adopted, could be a reason for those standard broadcasting facilities of a person owning a multiple number of stations, which are not augmented with FM and television facilities, becoming valueless and the owner thereof being injured irreparably with respect to property and financial loss. It is inconceivable that any regulatory instrumentality which would either encourage or make possible such a condition could be considered to be in the interest of public interest, convenience or necessity and for the benefit of the public.

126-131 Before the Federal Communications Commission at Washington, D. C.

OFFICIAL REPORT OF PROCEEDINGS—January 17, 1949

Docket No. 8967

In the matter of: The Amendment of Sections 3.35, 3.240 and 3.640 of the Rules and Regulations relating to Multiple Ownership of AM, FM and Television Broadcast Stations

* * * * * * *

132-151 ORAL ARGUMENT OF PARAMOUNT PICTURES, INC., AND ASSOCIATED COMPANIES

By Mr. D. M. PATRICK:

Mr. PATRICK: If the Commission please, Paramount Pictures, Inc., and its subsidiary and associated companies Balaban and Katz Corporation, Paramount Television Productions, Inc., New England Theatres, Inc., United Detroit Theatres Corporation, and Gulf Theatres, Inc., desire to present three points in connection with the proposed multiple ownership rule now under consideration as it respects the television industry. They desire first to question the basic authority of the Commission to promulgate a rule of this character under the terms of the statutes involved, namely, Communications Act of 1934, as amended, and the Administrative Procedure Act. Secondly, they desire to question the exercise of policy involved in the adoption of a rule of this kind at this time in view of the formative state of the television industry and the allocation problems which have as yet not been determined. Finally, they desire to make certain suggestions concerning the meaning and application of the proposed rule and particularly paragraph (c) of that rule in view of the factual situation which now exists and which may exist effecting the above-named companies.

* * * * * * *

152-174 ORAL ARGUMENT OF COLUMBIA BROADCASTING SYSTEM

By Mr. JOSEPH REAM:

Mr. REAM: Mr. Chairman, and members of the Commission: At the argument today I would like to bypass many of the areas which have been the subject of a great deal of discussion and argument both formally before the Commission and informally within the industry. Accordingly, if it is agreeable with the Commission, I will not touch upon such questions as the authority of the Commis-

sion to issue rules as proposed, or any rules which purport to set standards for station ownership by fixed numbers; or the whole question of possible conflict between fixed limitations and the much broader question of qualifications of licensees and the record of their performance in serving the public interest; or the inapplicability of the antitrust laws as a support for a fixed limitation.

* * * * * * * * *

175 ORAL ARGUMENT ON BEHALF OF FORT INDUSTRY COMPANY

By MR. PAUL A. O'BRYAN:

In the opinion of the Fort Industry Company the proposed amendment of Sections 3.35, 3.240 and 3.640 of the Rules and Regulations relating to multiple ownership of AM and FM and Television Broadcast Stations described in docket No. 8967 should not be adopted in the form set forth. The Fort Industry is concerned primarily with the manner in which Docket No. 8967 proposes to limit the number of FM and Television Stations which may be operated by one person.

My argument will not consist of a recitation of legal decisions designed to attack the legality of the proposed amendment, but it will consist in enunciation of the illogicalness and impracticability of the proposed amendment in so far as it seeks to limit the number of FM and Television stations which may be owned, operated or controlled by one person.

The Fort Industry Company considers that public interest, convenience and necessity would be served best if the proposed amendment permitted the ownership of the same number of FM stations and television stations as standard broadcast stations.

176-180 In other words, a person should have the opportunity to own, operate or control the same number of FM stations and the same number of television stations as the number of standard broadcast stations which that person, directly or indirectly, owns, operates or controls; provided, of course, that in all other respects the person is legally, technically and financially qualified to own and operate such number of stations.

* * * * * * * * *

181 COLLOQUY

THE CHAIRMAN: Could I assume that your argument would support the Commission fixing an equal number of stations in each of these fields, FM, Television and AM?

MR. O'BRYAN: Of course, Mr. Chairman, we would hate to see that condition exist.

The CHAIRMAN: I am talking now about the principle of the argument.

Mr. O'BRYAN: The principle of the argument is that the number of FM facilities and number of Television facilities which one has should be able to match the number of broadcast stations, standard broadcast stations.

The CHAIRMAN: Whether that is 5 or 7 or not, so far as the principle of your argument is concerned, it should be matched?

Mr. O'BRYAN: Yes.

The CHAIRMAN: The question is then bringing the FM and television facilities, so far as Fort Industry is concerned, up to the maximum you now own in the AM field to 7?

Mr. O'BRYAN: That is correct, Mr. Chairman.

182 The CHAIRMAN: What is the justification for that, rather than reducing the 7 to 5?

Mr. O'BRYAN: May I counter with a question, sir?

The CHAIRMAN: You might, but I do not know that I will answer it.

Mr. O'BRYAN: I would first want to know the justification for reducing the 7 to 5.

The CHAIRMAN: It seems to me you pose the question one way, and in the question I pose it is quite as logical in the other direction. I cannot see the difference in the problem, as to whether it should be 5 or 7. How do you arrive at the number? Why do you think 7 is the sound number?

Mr. O'BRYAN: I don't necessarily say 7 is the sound number. If it is determined by the Commission that the maximum number of standard broadcast stations which a licensee may have is 8, then, as I have argued thus far, our feeling would be that the licensee should be permitted to have 8 FM stations and 8 television broadcast stations, if he elected to invest his money in them.

* * * * * * *

183 ORAL ARGUMENT ON BEHALF OF JOHNSON-KENNEDY RADIO CORP.

By MR. THOMAS N. DOWD.

Mr. DOWD: Before starting with reference to the immediate problem facing Johnson-Kennedy Radio Corporation I should only like to suggest that the dilemma which appears to be posed by the Commissioner's question to Mr. O'Bryan as to why it should be 5 rather than 7 could somehow be answered by the fact

184-188 that any rule which the Commission should impose that is against common sense would be arbitrary and therefore there would be as much justification for one as the other.

* * * * * * *

189-344 ORAL ARGUMENT ON BEHALF OF KMMJ, INCORPORATED, SALT LAKE CITY BROADCASTING CORPORATION, TRANS-AMERICA TELEVISION CORPORATION AND UNIVERSAL BROADCASTING COMPANY

By Mr. JAMES A. MCKENNA.

Mr. MCKENNA: My argument falls in two parts: First of all, the Commission lacks authority to adopt these rules, and second, even if it had the authority it would be an unwise exercise of policy to adopt it.

The notice of proposed rule-making states that the proposed rules are being issued under the authority of Sections 303 (r), 311, 313 and 314 of the Communications Act.

This specification of authority is apparently made pursuant to the requirement of Section 4 (a) of the Administrative Procedure Act which provides that general notice of proposed rule-making shall be given and that such notice shall include "reference to the authority under which the rule is proposed."

I have assumed, therefore, that the Commission has specified the full statutory authority on which it relies, and that unless the rules come within the authority, the Commission lacks jurisdiction to adopt them in this proceeding. This is not intended to suggest, by inference, that authority to adopt the rules may exist under other provisions of the Communications Act.

* * * * * * * *

345 FCC 48-1968
24954

Before the Federal Communications Commission
Washington, D. C.

Docket No. 8967

In the Matter of

The Amendment of Sections 3.35, 3.240 and 3.640 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations.

NOTICE OF PROPOSED RULE MAKING

1. Notice is hereby given of proposed rule making in the above-entitled matter.

2. The Commission proposes to amend Section 3.35, 3.240 and 3.640 of its Rules and Regulations in the manner set forth in the attached Appendix.

3. The proposed rules are issued under the authority of Sections 303(r), 311, 313 and 314 of the Communications Act of 1934.

4. Any interested person who is of the opinion that the proposed amendments should not be adopted, or should not be adopted in the form set forth, may file with the Commission on or before September 27, 1948, a written statement or brief setting forth his comments. Persons desiring to support the rule may also file comments by the same date. The Commission will consider all comments, briefs and arguments presented before taking final action with respect to the proposed rules.

6. Fifteen copies of each brief or written statement should be filed as required by Section 1.764 of the Commission's Rules and Regulations.

FEDERAL COMMUNICATIONS COMMISSION,

T. J. SLOWIE,
Secretary.

Adopted: August 18, 1948
Released: August 19, 1948

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APPENDIX*

3.35 Multiple Ownership—(a) No license for a standard broadcast station shall be granted to any person (including all persons under common control [1]) if

(1) such person directly or indirectly owns, operates, or controls another standard broadcast station located in the same community or in another community in the same metropolitan district or if such person directly or indirectly owns, operates, or controls another standard broadcast station with a substantial overlap in the service area of such stations. In determining what constitutes substantial overlap consideration will be given to the facts of each case with particular reference to such factors as the classes of stations involved, geographic extent of overlap, location of centers of population, distribution of population, other competitive service to the overlap area, location of trade areas, metropolitan districts, and political boundaries; areas and populations to which the service of the station directed (as indicated by commercial business of the station, news broadcasts, sources of programs and talent, nature of programs, coverage claims, and listening audience), and location of main and secondary studios: or

---

* The proposed provisions of Sections 3.240 and 3.640 relating to multiple ownership of FM and Television broadcast stations are not set forth in the Appendix. They are the same as Section 3.35 except as noted.

[1] The word "control" as used herein is not limited to majority stock ownership but includes actual working control in whatever manner exercised.

(2) such person or any stockholder, officer or director of such person directly or indirectly owns any interest in, or is an officer or director of, another standard broadcast station located in the same community or in another community in the same metropolitan district; or

(3) such person, or any stockholder, officer or director of such person, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other standard broadcast station if the grant of such license would result in a concentration of control of standard broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a cocentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the
347 number of people served, classes of stations involved, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for a person directly or indirectly to own, operate or control more than seven standard broadcast stations,[2] or for any person or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than fourteen standard broadcast stations.[3]

If such person controls directly or indirectly fewer than seven standard broadcast stations (referred to in the table below as "Number of Stations Controlled") or if such person or any of its stockholders, officers or directors have a direct or indirect interest in or are stockholders, officers or directors of fewer than fourteen standard broadcast stations (referred to in the table below as "Number of Stations with Interest Less than Control) the maximum limitation shall be as follows:

If the Number of Stations Controlled Is	Then the Maximum Number of Stations with Interest Less Than Control May Be:
7	0
6	1 or 2
5	3 or 4
4	5 or 6
3	7 or 8
2	9 or 10
1	11 or 12
0	13 or 14

[2] Six in the case of FM and five in the case of Television.

[3] Twelve in the case of FM and ten in the case of Television.

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For FM

The Table is as Follows

6	0
5	1 or 2
4	3 or 4
3	5 or 6
2	7 or 8
1	9 or 10
0	11 or 12

For TV

The Table is as Follows

5	0
4	1 or 2
3	3 or 4
2	5 or 6
1	7 or 8
0	9 or 10

(b) In applying the provisions of subsection (a) hereof to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1% or more of the outstanding voting stock.

(c) The effective date of this rule shall be postponed until January 1, 1953, for existing situations which are in conflict with the rule in order to permit the orderly disposition of interests. This extension will not be applicable to any case where complete disclosure of all facts was not made to the Commission on or before August 19, 1948.

FCC 53-1570
97842

Before the Federal Communications Commission
Washington 25, D. C.

Docket No. 8967

[Title omitted]

349

Report and Order

By the Commission: Commissioner Hennock concurring in part and dissenting in part and issuing a statement.

1. This proceeding involves a proposal to amend Sections 3.35, 3.240 and 3.636 (formerly 3.640) of the Commission's Rules and Regulations which relate respectively to multiple ownership of AM, FM and television broadcast stations.

2. The proceeding was instituted by the issuance of a Notice of

Proposed Rule Making on August 19, 1948 (13 F.R. 5060). The following parties submitted written comments with respect to the proposed amendments and also participated in the oral argument held before the Commission *en banc* on January 17, 1949: Paramount Pictures, Inc., Balaban and Katz Corporation and Gulf Theatres, Inc. (the "Paramount group"); Columbia Broadcasting System, Inc.; the Fort Industry Company; KMMJ, Inc., Salt Lake City Broadcasting Corporation, Trans-America Television Corporation and Universal Broadcasting Company (the "McKenna group"); and National Broadcasting Company, Inc. In addition, written comments were submitted by Mr. E. B. Craney and Mr. Arthur W. Scharfeld.

3. The parties to this proceeding have raised numerous objections to the proposed amendments. These objections fall generally into two categories. The first group challenges the authority of the Commission to adopt rules of general applicability dealing with the subject multiple ownership of broadcast stations, while the second group objects to specific provisions of the proposed amendments. We shall first take up the arguments of the former group.

4. There has been general agreement among the parties to this proceeding that in order to guard against monopolistic tendencies and to preserve competition in the broadcasting industry the Commission can and should, in the exercise of its licensing functions, give consideration to the multiple ownership of stations. Nevertheless, it has been argued that the Commission must announce the general principle of law governing the multiple ownership of broadcast stations on a case-to-case basis only and that the Commission is here precluded from issuing rules of general ap-
350 plicability. This argument, however, fails to consider the specific rule making powers conferred on this Commission by the Communications Act,[1] and the consistent rulings of the courts

[1] Section 4(i) provides:

"(i) The Commission may perform any and all acts, make such rules and regulations and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

Section 303(r) provides:

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall——

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"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may

sustaining the rule making powers of this Commission, as well as other government agencies.[2] Under the Communications Act, the Commission has full authority to adopt rules giving effect to the principles that will apply in licensing radio stations pursuant to the statutory touchstone of "public convenience, interest and necessity." Such rules are designed to implement and enforce the Act and to announce publicly Commission policy with respect to factors which may warrant a denial of a license because they are incompatible with the policies and purposes of the Act. The rule making powers conferred on the Commission, expressly set forth in Sections 4(i) and 303(r) of the Act, not only authorize the adoption of rules but affirmatively direct the Commission to make such regulations as may be necessary to carry out the provisions of the Act. In addition to its rule making powers, the Commission may proceed on a case-to-case basis so that the policies and purposes of the Act will be implemented within the framework of particular cases. The choice between these alternative techniques
351 for the implementation of the Act must be determined in light of all the relevant considerations presented by the particular problem. The Supreme Court in *Securities and Exchange Commission* v. *Chenery Corp.* 332 U.S. 194, 203-204, stated:

> ". . . an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
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> ". . . There is thus a very definite place for the case-by-case evolution of the statutory standards and the choice made between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the

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be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

[2] *National Broadcasting Company* v. *United States*, 319 U.S. 190 affirming 47 F. Supp. 940; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 420-421; *Heitmeyer* v. *Federal Communications Commission*, 68 App. D.C. 180, 95 F. (2d) 90; *Ward* v. *Federal Communications Commission*, 71 App. D.C. 166, 108 F. (2d) 486; *cf. Stahlman* v. *Federal Communications Commission*, 75 App. D.C. 176, 126 F. (2d) 124; *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194; *Lichter* v. *United States*, 334 U.S. 742.

administrative agency. See *Columbia Broadcasting System* v. U. S., 316 U.S. 407, 421."[2a]

Our determination here that the problems presented by the multiple ownership of broadcast stations are best resolved by the promulgation of rules of general applicability is made on the basis of the knowledge and experience acquired by this Commission over a period of more than a decade in the handling of these problems.[3]

5. The provisions of Sections 3.35, 3.240 and 3.636 governing the multiple ownership of broadcast stations and the amendments thereof proposed in this proceeding were promulgated pursuant to the general rule making authority contained in Sections 4(i) and 303(r) of the Act and are designed to implement the Congres-
352 sional policy against monopoly enunciated specifically in Sections 311 and 313 of the Communications Act. Parties to this proceeding have urged that the promulgation of these rules by this Commission is an attempt to enforce the anti-trust laws of the United States which function Congress has delegated to the Department of Justice. This contention has been advanced before, and expressly rejected by the courts. Thus, in *Mansfield Journal Co.* v. *Federal Communications Commission*, 86 U.S. App. D.C. 102, 180 F. (2d) 28, the court stated:

> "Appellant argues that this amounts to enforcement of the anti-trust laws. But whether appellant has been guilty of a violation of these laws is not here in issue. The fact that a policy against monopoly has been made the subject of criminal sanction by Congress as to certain activities does not preclude an administrative agency charged with furthering the public interest from holding the general policy of Congress to

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[2a] In at least three cases in recent years the courts have expressly rejected arguments that the Federal Communications Commission should act on a case-by-case basis rather than by adopting general rules specifying in advance the circumstances, under which it will or will not grant licenses. *National Broadcasting Company* v. *Federal Communications Commission*, 319 U.S. 190 (Chain Broadcasting Regulations); *Felman* v. *United States*, (N.D. Ill., Civil No. 49 C 227, *aff'd*, 339 U.S. 973 (Reserve time Rules); *American Broadcasting* v. *U. S.* (110 Supp. 374 (S.D. N.Y.)) (Lottery Rules).

[3] In 1940 the Commission adopted a multiple ownership rule for FM broadcasting stations (5 F.R. 2384); multiple ownership rules for television were adopted in 1941 (6 F.R. 2284); multiple ownership rules for AM broadcasting stations were adopted in 1943 (8 F.R. 16065). These rules have been reported to Congress and discussed in hearings but Congress has never taken action to abolish or circumscribe the Commission's authority to issue such rules.

be applicable to questions arising in the proper discharge of its duties. * * * Monopoly in the mass communication of news and advertising is contrary to the public interest, even if not in terms proscribed by the anti-trust laws."[4]

6. Nor do we find merit in the contention that Section 9(a) of the Administrative Procedure Act, 5 U.S.C., Section 1008, which provides that "no sanction shall be imposed or substantive rule or order be issued except within the jurisdiction delegated to the agency and as authorized by law", prohibits the adoption of these rules. The legislative history of Section 9(a) leaves no doubt that the Section was not intended to prevent an agency from adopting rules which it would be otherwise authorized to issue but was merely designed to "afford statutory recognition for the basic rule of law embodied in judicial decisions." Senate Judiciary Committee Print, June 1945, in Sen. Doc. No. 248, 78th Cong. 2d Sess., p. 34.[5]

353 7. The objections advanced by the parties to this proceeding against the specific provisions of the amended rules are considered below.

8. We need not here take up those arguments directed to the overlap and allied provisions of the outstanding proposal (subsections (1) and (2)). We have determined not to effectuate, at this time, any changes with respect to overlap. We recognize that some changes may well be desirable, but recent developments, particularly in television,[6] compel reconsideration of the entire overlap question. While certain features of the outstanding proposal are unrelated to these developments and would appear to

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[4] See also *National Broadcasting Company* v. *United States*, 319 U.S. 190; *Southern Steamship Company* v. *National Labor Relations Board*, 316 U.S. 31.

[5] The Attorney General's Manual on the Administrative Procedure Act makes it clear that the purpose of Section 9(a) was to prevent administrative agencies from imposing sanctions or adopting substantive rules which had not been specifically or generally authorized by Congress. See also Senate Report on S. 7 in Sen. Doc. 248, 79th Cong. 2d Sess., p. 211, and House Report on S. 7 in Sen. Doc. 248, 79th Cong. 2d Sess., p. 274.

[6] Involved here is the question of determining the extent of overlap—that is, the population and area encompassed by the overlap. As brought out in the Sixth Report and Order (pars. 85, 88, 90, 91) and several recent cases (*In re Application of Westinghouse Stations, Inc.*, 8 Pike & Fischer RR 381; *In re Application of Louis Wasmer*, 9 Pike & Fischer RR 713), this presents a particularly difficult problem in television because of the technical data available and the rules drafted on the basis of such limited data.

merit adoption, it is felt that such a piecemeal approach is inappropriate. Accordingly, we take no action here changing the present provisions of our rules governing overlap situations.

9. We turn now to the objections to the proposed provisions which deal with the total number of stations in which a licensee should be permitted to have an interest. The proposed rules provide that the determination whether the grant of a license would result in a concentration of control of broadcasting facilities inconsistent with the public interest will depend on the facts of each case; and the factors which the Commission will consider in making that determination are set forth with particularity. It is further provided that the Commission will consider the ownership, operation or control directly or indirectly of more that 7 AM, 6 FM or 5 TV broadcast stations by any person to constitute a concentration of control contrary to the public interest. It is also provided that no person or any of its stockholders, officers or directors may have a direct or indirect interest in or be stockholders, officers or directors of more than 14 AM, 12 FM or 10 TV broadcast stations. Tables are also included in the rules which specifically set forth the maximum number of stations in which any person
354 or its stockholders, officers or directors may have interests less than control.

10. One of the basic underlying considerations in the enactment of the Communications Act was the desire to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcasting system on a free competitive basis. See *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470. This Commission has consistently adhered to the principle of "diversification" in order to implement the Congressional policy against monopoly and in order to preserve competition. That principle requires a limitation on the number of broadcast stations which may be licensed to any person or to persons under common control. It is our view that the opefation of broadcast stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees. The vitality of our system of broadcasting depends in large part on the introduction into this field of licensees who are prepared and qualified to serve the varied and divergent needs of the public for radio service. Simply stated, the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest. In this connection, we wish to emphasize that by such rules diversification of program services is furthered without any governmental encroachment on

what we recognize to be the prime responsibility of the broadcast licensee (See Section 326 of the Communications Act). It is to effect this purpose that the foregoing specific limitation on the number of stations that may be owned, operated or controlled by any person, has been included in the multiple ownership rules.[7]

11. In view of the arguments advanced by some parties that the proposed rules are arbitrary in that they give no effect to class and size of stations, geographical locations, populations served, and similar factors, we have considered alternatives to the outstanding proposal.[8] But as a result of a study of the present holdings of multiple owners, we have concluded that any proposal to limit multiple ownership on the basis of such factors as class of station or geographical location, is either unsatisfactory or unworkable.[9] For a formula, which we believe would reasonably limit ownership on such bases, would require extensive divestment of holdings by existing licensees; it is felt that this would be unduly disruptive. On the other hand, if existing licensees are to retain their present holdings, no formula can be devised which does not substantially extend the present maximum limitation on station ownership—a result felt to be completely unwarranted in view of the important policy considerations involved. As to devising a reasonable formula and "grandfathering" present holdings however greatly excess of this new criterion, this is believed improper in view of the extensive multiple AM holdings and the nature of such holdings built up over that service's long history

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[7] Such limitations have been in effect for the FM and TV service since the multiple ownership rules for those services were adopted. The original limit of three television stations was subsequently raised to 5 in the light of changed conditions.

[8] *In the Matter of Bruntonet al.*, 3 Pike & Fischer RR 291. On the basis of the facts in that proceeding, the Commission considered and gave weight to such factors as the class and power of stations in determining whether the requested transfer of an additional station to CBS would be in the public interest. The Commission's decision in that proceeding does not, however, preclude the adoption under appropriate circumstances of rules of general application such as are involved here.

It should also be noted that even if all the AM stations owned by the one party are small, there is a tendency to concentrate in the same general area; under these circumstances, ownership of more than 7 stations would result in a concentration of control that would be contrary to the public interest.

[9] It is important to note that the proposed rules do take these factors into consideration in situations not involving an application for facilities in excess of the maximum permissible number.

and the consequent unfairly preferential treatment accorded such multiple owners. We conclude, therefore, that the method employed in our outstanding proposal is the only sound and workable one because of the history and present development of the broadcast industry.

12. As stated, the outstanding proposal equates two minority non-controlling holdings with one full or controlling ownership.

356 In view of the contention made that the proposal is objectionable because of this effort to deal with interests less than control (e.g., that "[it] endeavor[s] to reduce to simple mathematical formulae matters that are incapable of such reduction"), we have re-examined this facet of the matter. It is our conclusion that the principle of diversification and the realities of the situation require that no distinction be made between a minority non-controlling interest and a full or controlling one. While the holder of a small interest in many instances may have slight influence on the operation of the station in question, it is also true such a person can exert a considerable influence—to an extent clearly within the objectives and purview of the described diversification policy. Several factors should be noted here: (1) there may not be a correlation between the size of the minority holding and the extent of the influence wielded; (2) it is impossible to determine on the face of the application what the influence of the multiple owner will be; indeed, it may be difficult or incapable of definite ascertainment even in a subsequent hearing; and (3) in the case of the holder who has interested himself in numerous stations, there is a good probability that because he is so actively engaged in the broadcast field, his influence will tend to be a positive or substantial one. For these reasons, we are of the opinion that to permit parties to acquire interests of any nature in more than the specified maximum numbers of stations set out within would tend to defeat the diversification policy. We have accordingly revised the multiple ownership rules so as to preclude such holdings.[10]

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[10] We note that some parties who now have television interests in five stations which include some of a minority nature, have applied for additional television facilities, presumably relying on the absence of any specific provision dealing with minority holdings. We feel that such parties, who may have gone to considerable expense and otherwise relied on the policy prevailing before this change, should not be penalized procedurally by the immediate dismissal of their applications. Therefore, parties who have applied for interests in excess of five before the date of adoption of this rule change and whose applications—because their holdings involved minority interests—were not defective under 1.36(c) or

357 13. Section (a)(3) of the attached rules is also concerned with the interests that any stockholder, officer or director of a party applying for a license may have in other stations. Objections have been raised to the consideration of the interests of those who are only officers or directors but not stockholders of applicants or licensees. Such objections, however, ignore the practical realities of business organization and control, particularly in the case of corporations. In numerous business organizations the actual day to day control is in the hands of officers and directors who are not necessarily owners or stockholders. Reference need only be made to the history of the antitrust laws to discover the consequences which may flow from interlocking directorships and managements. And it is significant that Congress has inserted provisions in the antitrust laws specifically to guard against evils resulting from the interlocking interests of directors, officers and even employees of business organizations. See 15 U.S.C., Sections 19, 20. In light of these considerations, the Commission believes that it is both reasonable and necessary to take cognizance of the interests of directors and officers of licensees and applicants in order to preserve competition and prevent monopoly in the broadcasting field.

14. With respect to stockholders, Section (b) of the proposed rules provides that in applying Section (a) in the case of corporations having more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who own 1% or more of the outstanding voting stock. It has been suggested that only holders of 5% or more of the stock of such corporations should be considered. The Commission is of the opinion, however, that the provision as originally proposed should be adopted for the reason that in corporations of large size, owners of 1% of the stock may have considerable voice in the control and management; and that interests of that size should properly be considered in the application of these rules.

15. Neither the present nor proposed rules on limiting multiple

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inconsistent with other pending applications of the party within 1.362, may, if they desire, continue to prosecute their applications by a request for waiver of either 1.362 or 1.361(c). It should be clearly understood that the waiver thus granted is a procedural one only, permitting the parties involved to continue in their hearings or other processing procedure; the holdings of such parties, whether minority or controlling, must conform to the maximum number established in the rules here adopted. It follows that a grant to such a party bringing its interests to six would be conditioned on divestment of some other interest.

ownership in TV make any distinction between VHF and
358 UHF stations. The Commission has received several peti-
tions [11] requesting that such a distinction be made, and that
either no limitation be placed on the ownership of UHF stations or that the limitation on TV holdings be raised to either 7 or 8 with no more than five in the VHF service. This argument rests on the premise that such action is desirable in order to promote the early development of UHF. Oppositions to these proposals have also been submitted.[12] The opponents argue that the proposed liberalization of the ownership limitation with respect to UHF stations is not in the public interest and that "If it appears that UHF is not developing as rapidly as desired, and if smaller communities are not being served by television, and if no other solution is in sight, there will be time enough to take such a drastic step as has been suggested." The Commission is now actively engaged in studying the position of the post-freeze TV station. We note that other interested parties are also engaged along this line.[13] Accordingly, we are deferring consideration of the multiple ownership facet of the UHF question to the over-all UHF study.

16. We turn now to what is the appropriate specific limitation in each service on the number of stations in which one person may hold an interest. The attached rules continue in effect the existing limitation on TV station ownership which, in our judgment based on extensive experience with the problems of multiple ownership, have proven practicable and desirable. It is argued that the rules should permit the ownership of the same number of TV stations as AM since TV operations now need to be buttressed by the profits of the AM operation while the latter may need such service from the former in the future. But the period when television operations
359 were largely supported by AM profits has passed, and television stations, by and large, are either now operating at a profit or can reasonably look forward to such operation in the future. As to the converse argument, it is believed that restrictions on multiple ownership should be related to the circumstances of the present and immediate future rather than to some remote or possible set of circumstances in the indefinite future. In

[11] These petitions were filed by the National Broadcasting Company, Inc., American Broadcasting Company, Inc., and Allen B. DuMont Laboratories, Inc.

[12] The opposing parties are Senator Edwin C. Johnson, Redwood Broadcasting Co., Fairmount Broadcasting Co., and New England Television Company.

[13] See e.g., the petition of the newly formed Ultra High Frequency Television Association dated October 27, 1953.

the absence of circumstances which we do not now foresee, we believe that the policy of diversification requires the adoption of the 5 station limitation.[14]

17. With respect to interests in FM broadcast stations, the attached rules, unlike the proposal which specified a 6 station FM limitation, raise the limitation to seven—the AM figure. It is considered desirable to have the same limitation applicable to both aural services because of their inter-relationship and the present status of FM's growth.[15]

18. The specific limitation on the holding of interests in excess of seven AM broadcast stations is a new provision of the Commission's Rules on multiple ownership. Aside from the factors set out in the prior paragraph, the greater potential of FM as compared to AM for the accommodation of broadcast stations might have justified a more severe limitation in AM than the limitation imposed in FM. It was determined, however, to limit the holdings in AM stations of any one person to seven in order that present holdings of such stations be not unduly disrupted. The specific limitation of 7 stations contained in the attached rule is consistent with the historical development of AM broadcasting and the tremendous expansion that has been achieved almost en-
360 tirely within the framework of that limitation: only a very few parties have holdings in excess of 7. As to these latter few, orders to show cause why they should not divest themselves of so much of their holdings as is necessary to bring about conformity with the subject rule, will be issued. Decision as to whether or not divestment will be required will be made on the basis of the arguments adduced and the factors involved in each case.

19. In view of the above considerations, we find that the public interest, convenience and necessity will be served by the adoption of the attached rules. Authority for their adoption is contained

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[14] The argument is also made that no cogent reasons exist for the disparity in TV and AM multiple ownership rules in view of the fact that the TV station potential is approximately equivalent to the AM station number. But there is a substantial disparity between the number of *existing* AM and TV stations. Further, as brought out in paragraph 18, the AM figure of 7 was selected because of the tremendous expansion which has been achieved within the framework of that limitation; a lower figure would result in either severe disruption or, in the event of "grandfathering," preferential treatment being accorded too many licensees. No such consideration pertains to the determination of the TV figure.

[15] The most recent statistics available (January 1, 1953) show that of 600 FM broadcast stations, 538 are owned by AM licensees and for the most part, duplicate the AM programming.

in Sections 4(i), 303(r), 311, 313 and 314 of the Communications Act of 1934, as amended.

20. Accordingly, It is Ordered, this 25th day of November, 1953, that, effective 30 days after publication in the Federal Register, Sections 3.35, 3.240, and 3.636 of the Commission's Rules and Regulations are amended as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,*

WM. P. MASSING,
Acting Secretary.

(Seal)

Attachments
Appendix
Released: November 27, 1953.

APPENDIX

Section 3.35 *Multiple Ownership*—No license for a standard broadcast station shall be granted to any party (including all parties under common control [12]) if

(1) such party directly or indirectly owns, operates or controls another standard broadcast station, a substantial portion of whose primary service area would receive primary service from the station in question, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation; or

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(2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other standard broadcast station if the grant of such license would result in a concentration of control of standard broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of station involved and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control con-

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* See Separate Views of Commissioner Hennock attached.

[12] The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

trary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven standard broadcast stations.[13]

[13] In applying the foregoing provisions to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1% or more of the outstanding voting stock.

Section 3.240 · *Multiple Ownership*—No license for an FM broadcast station shall be granted to any party (including all parties under common control [13]) if

(1) such party directly or indirectly owns, operates, or controls another FM broadcast station which serves substantially the same service area; or

(2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other FM broadcast station if the grant of such license would
362 result in a concentration of control of FM broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven FM broadcast stations.[13a]

[13a] In applying the foregoing provisions to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1% or more of the outstanding voting stock.

[13] The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Section 3.636 *Multiple Ownership*—(a) No license for a television broadcast station shall be granted to any party (including all parties under common control [9]) if

(1) such party directly or indirectly owns, operates, or controls another television broadcast station which serves substantially the same area; or

(2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served,
363 and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessary for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations.[9a]

(b) Paragraph (a) of this section is not applicable to noncommercial educational stations.

Separate Views of Commissioner Hennock Concurring in Part and Dissenting in Part

I concur in the Commission's action to the extent that it adopts the rule limiting multiple ownership to seven AM seven FM and five TV stations. I disagree, however, with the following aspects of the Report and Order:

1) Footnote 10 appended to paragraph 12 of the Report and Order;

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[9] The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

[9a] In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1% or more of the outstanding voting stock.

2) The decision not to adopt at this time specific provisions governing overlap situations; and

3) The failure to provide a definite geographic limitation on the number of stations in which a person may have an interest.

1. Footnote 10 states that there are some parties who have interests in five television stations, which include some of a minority nature, who have applied for additional television facilities presumably relying on the absence of any specific provisions dealing with minority holdings. The footnote permits these parties to continue to prosecute their applications by a request for waiver of either Section 1.362 or 1.361 (c) of our Rules. It is pointed out that a waiver thus granted would be procedural in nature, merely permitting the parties involved to continue their hearings or other processing procedures; that the interests of
364 such parties, whether minority or controlling, must eventually conform to the maximum number established in the Rules adopted today; that a grant to such a party, bringing its interests to six television stations, would accordingly be conditioned on divestment of some other interest.

I strongly disapprove of this exception. It will result in permitting a TV applicant who is also a TV licensee, while prosecuting the application, to retain his existing interests, even though, if his application is granted, the resulting multiple ownership situation would be contrary to our Rules and would have to be adjusted through divestment.

In the past in the analogous cases we have consistently refused to permit such a practice. I have reference to the cases arising under Section 1.371, footnote 10, subsection 2 (c). This Rule reads:

> "An application by a licensee or a permittee of a television broadcast station which seeks to modify an outstanding license or permit to specify a channel other than that authorized in said license or permit will not be accepted for filing by the Commission with the exception of applications filed pursuant to Commission show-cause orders."

The purpose of this rule is to prevent an applicant from "standing astride" two channels at the same time, and the Commission has recognized that this is "a reasonable procedural method of implementing both the purpose of Section 3.636 (multiple ownership) and the equitable and efficient processing of applications." (In re the petition of *The Vindicator Printing Co.*, 8 Pike & Fischer R.R. 328). We have consistently, and rightly so, refused to waive this rule. Yet today the Commission has seriously undermined the rationale of its position. For, the parties to whom footnote 10 of this Report and Order applies will

be doing the very thing the quoted rule is intended to prevent—straddling two channels at the same time.

But even apart from the foregoing, I deem footnote 10 of the Report and Order to be legally unsound. It is axiomatic that even licensees have no vested right in their authorizations. They are bound by new rules which we adopt in the public interest.
365 Yet, here the Commission intimates that applicants may have such a right in their applications, because they "may have gone to considerable expense and otherwise relied on the policy prevailing before this change." This is bad law and worse policy. The Commission should not feel restrained in adopting rules in the public interest by the fact that such rules may adversely affect an applicant. I am not aware of any compelling public interest considerations that would require the Commission to afford such special treatment to the applicant or applicants who will benefit from this provision.

2. With respect to the overlap problem, I feel that this is the appropriate time to adopt specific standards governing the overlap situation especially so in television, and with respect to that service I would issue an appropriate proposal toward that end. The purpose of the multiple ownership rule is to prevent undue concentration of ownership of the mass media of communications. The overlap rules are an integral part of the rules directed toward effectively achieving this objective. The rules in effect today were adopted long before the Sixth Report and Order became effective. Their inadequacy to cope with overlap situations was recognized five years ago when the Notice of Proposed Rule Making in this proceeding was first issued. Yet today the Commission has, in effect, reaffirmed them. And it has done so in spite of the experience we have gained from the proceedings in Docket 8736 *et al.* and recent cases before us, which have conclusively proved, time and time again, that the available tools are too unreliable to deal realistically with TV overlap problems on a case-by-case basis.[1] We are not serving the public interest by refusing to face this problem now. Our failure to do so will undoubtedly result in a further regional concentration of ownership of media of mass communications, with its well known consequences of (a) limiting competition, (b) adversely affecting the diversification of control over the services of

[1] See e.g. pars. 88 and 91 of the Sixth Report and Order; *In re Applications of Westinghouse Radio Stations, Inc.*, 8 R.R. 381 and my Separate Views therein; cf. Sec. 3.683 of the Rules.

programs to the television public, (c) causing excessive con-
366 centration in the dynamic TV field, and (d) seriously threat-
ening the capacity of other licensees to compete effectively.

3. The rules adopted today contain an upper limit on the number of stations in which a party may have an interest. This in my opinion is not enough. For, it seems clear to me that an interest in less than the permitted maximum number of stations, concentrated in one state or a given geographical region, may often have a more deleterious effect on competition and constitute a more stifling concentration, than the ownership in excess of the permitted maximum scattered throughout the United States. Under the rules adopted today we will continue the practice of dealing with the problem of regional concentration on a case-by-case basis. If this were a new problem I would agree with this method. But having the benefit of experience I deem it inadequate. For, when faced with the problem of Regional monopolies, the Commission has repeatedly failed to give it a careful and mature consideration that it deserves.[3] I would limit the ownership, in TV at least, to not more than one station in any state or geographical region which may be considered as an integrated economic unit and would issue now an appropriate Notice of Proposed Rule Making with a view to accomplishing this result. I realize that such a rule, if adopted, would necessitate divestitures of some existing interests. But the benefit which would accrue to the public would far exceed any private inconvenience.

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[2] See my dissent to the grant to E. Anthony & Sons, Inc., Boston, Mass., Public Notice 88265, March 26, 1953.

[3] See my Dissents to the grant to Utah Broadcasting and Telecasting Corp., Public Notice 88265, 3/26/53; and to Southern Idaho Broadcasting and Telecasting Company, Public Notice 88098, 3/19/53; and my Dissent in GWAL, Inc., 9 R.R. 110, 119.

367 In the United States Court of Appeals for the District of Columbia Circuit

No. 12,065

STORER BROADCASTING CO., *Petitioner*

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

To the Honorable Judges of the United States Court of Appeals for the District of Columbia:

Storer Broadcasting Company (hereinafter referred to as Storer), presents this, its petition for judiciary review of a final order of the Federal Communications Commission, and in support thereof represents as follows:

I

Nature of the Proceedings

1. Storer seeks to review and set aside an order of the Commission entered in proceedings entitled, "In the Matter of the
368 Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations" (Order Serial No. FCC 53-1570, Docket 8967, adopted November 25, 1953 and released November 27, 1953). These proceedings were initiated on August 19, 1948 by the issuance of a Notice of Proposed Rule Making (13 F.R. 5060).

2. As amended by this Order, the Multiple Ownership Rules now provide that ownership of any interest in more than seven (7) Standard (AM) Radio; seven (7) FM Radio and five (5) Television Broadcast Stations will be considered by the Commission, without regard to any other fact or circumstance, to constitute a concentration of control contrary to the public interest, convenience or necessity.

3. The prohibition established by the Amended Rules is absolute and extends to the officers, directors and stockholders of controlling corporate interests. The concept of "control," in respect of corporations, in not limited to majority voting stock interests, and in the case of corporations having more than fifty stockholders, all officers, directors and all holders of one (1%) per cent or more of

the voting stock are, by definition, within the prohibition of the Rules.

4. Authority to promulgate the Order amending the Multiple Ownership Rules is stated by the Commission to be derived from Sections 4(i), 303(r), 311, 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C.A. § 151 *et seq.*

5. Sections 4(i) and 303(r) of the Act confer general authority upon the Commission to issue and Promulgate regulations not inconsistent with law, which may be necessary or desirable to effectuate provisions of the Act.

6. Section 313 makes applicable to interstate and foreign radio communications, all laws of the United States relating to unlawful restraints of trade and monopoly, and confers upon the court
369 of jurisdiction, authority and discretion to revoke the broadcast license of any person adjudged guilty of violating the anti-trust laws, in addition to the imposition of other penalties or sanctions.

7. Section 311 directs the Commission to refuse a license or permit to any person whose license or permit has been revoked by a Court under authority of Section 313.

8. Section 314 prohibits the acquisition, ownership or control of radio broadcast stations or facilities by common carriers, the purpose or effect of which is to substantially lessen competition, unlawfully restrain commerce, or unlawfully create monopoly in commerce.

9. A copy of the Commission's Report and Order (to which the Amended Rules are attached) is attached to this petition as Appendix A.

Statement of Jurisdiction

10. This Court has jurisdiction over the subject matter of this petition under Section 4 of the Judiciary Review Act of 1950 (5 U.S.C.A. § 1031-1042); Section 402(a) of the Communications Act of 1934, as amended (47 U.S.C.A. § 151-609); and Section 10 of the Administrative Procedure Act of 1946 (5 U.S.C.A. § 1009).

11. As appears from the Commission's Report and Order, Exhibit A hereto attached, Storer was a party to the Rule Making Proceedings in Docket 8967; filed comments and presented oral arguments to the Commission *en banc*, in opposition to the Rules as proposed.

12. Storer is a "party aggrieved" by reason of the Commission's Order within the meaning of Section 4 of the Judiciary Review Act of 1950, and is further a "person suffering legal wrong" and a "person adversely affected or aggrieved" by reason of the Commission's Order within the meaning of Section 10 of the Administrative Procedure Act of 1946.

370 Facts Upon Which Venue Is Based

13. Storer (formerly the Fort Industry Company) is a corporation organized and existing under the laws of the State of Ohio, having its principal place of business in Miami, Florida. Storer owns and operates, under license of the Commission, five (5) standard radio broadcast stations; five (5) FM radio broadcast stations, and three (3) television broadcast stations.

14. Storer also owns all of the capital stock of (a) San Antonio Broadcasting Company, a Texas Corporation having its principal place of business in San Francisco, Texas, and (b) Birmingham Broadcasting Company, Inc., an Alabama Corporation, having its principal place of business in Birmingham, Alabama. Each of these corporations respectfully owns and operates, under license of the Commission, one (1) standard radio broadcast station and one (1) television broadcast station.

15. Under the Multiple Ownership Rules of the Commission, Storer is deemed to be the owner and in "control" of seven (7) standard radio, five (5) radio, and five (5) television broadcast stations, under license of the commission, as follows:

Radio Broadcast Stations

Call Letters		Location
WGBS	WGBS-FM	Miami, Florida
WSPD,	WSPD-FM	Toledo, Ohio
WJBK,	WJBK-FM	Detroit, Michigan
WWVA,	WWVA-FM	Wheeling, West Virginia
WAGA,	WAGA-FM	Atlanta, Georgia
WBRC		Birmingham, Alabama
KABC		San Antonio, Texas

371 Television Broadcast Stations

Call Letters	Location
WSPD-TV	Toledo, Ohio
WJBK-TV	Detroit, Michigan
WAGA-TV	Atlanta, Georgia
WBRC-TV	Birmingham, Alabama
KEYL-TV	San Antonio, Texas

16. On August 31, 1953, Storer exhibited and filed its application with the Commission for construction permit for a new television broadcast station to be operated on Channel 10 in Miami, Florida. In its application Storer represented that if would accept a grant of Channel 10 in Miami, upon the express condition that it divest itself of any and all interest in one of its presently owned television

broadcast stations to achieve compliance with existing Multiple Ownership Rules. On November 25, 1953 (coincident with adoption of its Order amending the Multiple Ownership Rules) the Commission adopted a Memorandum Opinion and Order (Serial No. FCC 53-1563) dismissing Storer's application as being in conflict with the spirit and purpose of the Multiple Ownership Rules. A copy of the Memorandum Opinion and Order is attached to this petition as Appendix B.

17. Approximately twenty (20%) per cent of Storer's voting stock is publicly owned and held by more than 1200 stockholders in twenty-three states. Storer's voting stock is traded on the "over-the-counter" market and is bought and sold daily by the public through licensed dealers in securities. Storer has no present or future control over whether or not:

(a) Any public holder of one (1%) per cent or more of its voting stock, now or hereafter possesses or acquires any interest, directly or indirectly, in any other standard radio or television broadcast station, or

372 (b) Any person now or hereafter owning, or in control of any other standard radio or television broadcast station (or any officer or director or holder of one (1%) per cent or more of the voting stock of any other corporation owning radio or television broadcast stations) now is or hereafter becomes a holder of Storer voting stock.

18. Storer is adversely affected and aggrieved by the Order of the Commission adopted on November 25, 1953, amending the Multiple Ownership Rules, in that:

(a) Storer is denied the right of a full and fair hearing to determine whether its ownership of an interest in more than seven (7) standard radio and five (5) television broadcast stations, in light of and upon a showing of all material circumstances, will thereby serve the public interest, convenience and necessity.

(b) The acquisition of Storer's voting stock by the public under circumstances beyond the control of Storer, may and could be violative of the Multiple Ownership rules, as amended, and result in a forfeiture of licenses now held by Storer, with resultant loss and injury to Storer and to all other Storer stockholders.

Points Relied Upon As the Basis for Relief

19. The points relied upon as a basis for relief are as follows:

(1) The Rules are unsupported by statutory authority and erroneously construe and apply the provisions of Sections 311, 313.

and 314 of the Communications Act of 1934, as amended, from which they are stated to derive.

(a) Application of the Anti-Trust Laws to the radio broadcast industry does not authorize or permit the Commission to
373 create an absolute numerical proscription against the ownership of interest in radio and television broadcast stations.

(b) Numerical proscription necessarily characterizes ownership of an interest in excess of the prescribed limit as being a specie of monopoly and illegal *per se*.

(c) The Rules, in defining concentration of control contrary to the public interest by absolute numerical proscription, have created a novel measure of the Anti-Trust Laws and in so doing have usurped judicial functions reserved solely to the Courts.

(2) The Rules conflict and are inconsistent with the statutory mandate that the Commission grant applications for radio and television broadcast stations if the public interest, convenience or necessity will be served thereby.

(3) The Rules, in denying the right to make application for radio and television broadcast stations and to have a hearing thereon as prescribed by statute, constitute a denial of due process of law under the Fifth Amendment of the Constitution.

(a) In creating an absolute numerical proscription, the Commission has established a conclusive presumption that ownership in excess of the prescribed limit is unlawful.

(b) Numerical proscription, having no rational relationship to the National Anti-Trust policy, is a denial of due process.

(4) The Rules, in considering the ownership of one (1%) per cent or more of the voting stock of a broadcast licensee corporation as equivalent to ownership, operation or control of the station, are unreasonable and bear no rational relationship to the national Anti-Trust policy.

(a) The existence of "control" must be determined by the facts and circumstances in each individual case.

374 Relief Prayed For

20. Wherefore, Petitioner respectfully prays:

(1) That upon final hearing and review, this Court will, by appropriate Order, Judgment or Decree, forthwith set aside and declare unlawful and without force or effect, the Order of the Commission adopted November 25, 1953 in Docket 8967, together with the

Multiple Ownership Rules promulgated thereby, insofar as and to the extent that said Order and Multiple Ownership Rules;

(a) Deny the right to a full and fair hearing to determine whether ownership, operation or control of more than seven (7) standard radio, seven (7) FM radio, and five (5) television broadcast stations, upon application therefor, will serve the public interest, convenience or necessity.

(b) Provide that ownership of one (1%) per cent or more of the voting stock of a corporation shall be considered as equivalent to ownership, operation or control of such station in determining the existence of a concentration of control contrary to the public interest, convenience or necessity.

(2) That the Court will grant such other or further relief as to this Court appears meet and just.

Respectfully submitted,

STORER BROADCASTING COMPANY,
By (Signed) THOMAS H. WALL,
Dow, Lohnes and Albertson,
Munsey Building,
Washington 4, D. C.,
Telephone: Sterling 3-1000,
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375 *Of Counsel*
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Bay Harbor Island
Miami Beach 41, Florida

Dated: January 22, 1954

Duly sworn to by John E. McCoy. Jurat omitted in printing.

376 [Appendix A attached to the Petition for Review, the Report and Order of the Commission, Docket No. 8967, is not printed here but appears at pages 349 through 366 of this Joint Appendix]

Appendix B Attached to Petition for Review

Before the
Federal Communications Commission
Washington 25, D. C.

FCC 53-1563

97834

In re Application of

Storer Broadcasting Company
Miami, Florida

For Construction Permit for
New Television Broadcast Station

MEMORANDUM OPINION AND ORDER

By the Commission:

Commissioner Hennock not participating.

1. The Commission has before it a "Motion to Dismiss", addressed to the subject application and filed on September 8, 1953, by WKAT, Inc., an applicant for Channel 10 in Miami. An "Opposition to Motion to Dismiss" was filed on September 14, 1953 by Storer Broadcasting Company.

2. Storer is the licensee of WJBK-TV in Detroit, WSPD-TV in Toledo and WAGA-TV in Atlanta. In addition, it owns 100% of the stock of the licensees of KEYL (TV) in San Antonio and WBRC-TV in Birmingham. It thus owns or controls the maximum number of television stations permitted under common ownership by Section 3.636(b) of the Commission's Rules. The subject application for Channel 10 in Miami contains representations and agreements by Storer that, in the event its application is granted, Storer will divest itself of all interest in one of the existing television stations it owns or controls, and that it will accept a grant of the application subject to the express condition that it divest itself of all interest in one of the said stations. Storer describes its application, however, as "not contingent".

377 3. Immediately prior to Storer's acquisition of control of the Birmingham station, it owned or controlled the other

four stations listed in paragraph "2", above. In addition, it had pending television applications for channels in Wheeling, West Virginia-Steubenville, Ohio, and in Miami, Florida. WSTV, Inc., Storer's competing applicant in Wheeling-Steubenville, petitioned the Commission and requested that Storer be directed to elect which of its pending applications it desired to prosecute. In a Memorandum Opinion of January 29, 1953, we held that Storer's applications for Miami and Wheeling-Steubenville were inconsistent and conflicting with each other within the meaning of Section 1.362 of our Rules.[1] However, we viewed the participation by Storer in a pending rulemaking proceeding (Docket 8967) (in which it urged that Section 3.636 (b) [2] be amended to permit the ownership of at least seven television stations by any person) as a request for waiver of or exception to the multiple ownership rules within the meaning of Section 1.361 (c) [3] of our Rules, and, ac-

[1] Section 1.362 *Inconsistent or conflicting applications.* When an applicant has an application pending and undecided, no other inconsistent or conflicting application filed by the same applicant, his successor or assignee, or on behalf or for the benefit of said applicant, will be considered by the Commission.

[2] Section 3.636 *Multiple Ownership.* (b) No person (including all person under common control) shall, directly, or indirectly, own, operate, or control more than one television broadcast station, except upon a showing (1) that such ownership, operation, or control would foster competition among television broadcast stations or provide a television broadcasting service distinct and separate from existing services, and (2) that such ownership, operation, or control would not result in the concentration of control of television broadcasting facilities in a manner inconsistent with public interest, convenience, or necessity: *Provided, however,* That the Commission will consider the ownership, operation, or control of more than five television broadcast stations to constitute the concentration of control of television broadcasting facilities in a manner inconsistent with public interest, convenience, or necessity.

[3] Section 1.361 *Defective applications.* (c) Applications which are not in accordance with the commission's Rules, Regulations or other requirements will be considered defective unless accompanied either (1) by a petition to amend any rule or regulation with which the application is in conflict, or (2) by a request of the applicant for waiver of or an exception to, any rule, regulation or requirement with which the application is in conflict. Such request shall show the nature of the waiver or exception desired and set forth the reasons in support thereof. [This rule reads as it did prior to amendment on November 4, 1953].

cordingly, we did not then require Storer to elect which of
378 its two applications it wished to pursue or, failing such election, dismiss the latest filed of the two applications. We thus retained both of Storer's applications on file pending final determination of the rulemaking proceeding previously referred to, pointing out, however, that such retention did not require the suspension of the processing of any applications competing with its Wheeling-Steubenville application, the later filed of its two applications. That case being one of first impression, we afforded Storer a period of 30 days to elect which of the two applications it wished consideration be given. *In re Applications of WSTV, Inc., et al.*, 8 Pike and Fischer R. R. 854. Thereafter, and after our denial of Storer's petition for reconsideration and stay (9 Pike and Fischer R. R. 175), Storer requested dismissal of both the Wheeling-Steubenville and the Miami applications, and acquired control of the Birmingtón station:

4. In requesting that the Storer application not be accepted for filing, petitioner (WKAT) alleges, in general, that the application is fatally defective in that it is in contravention of Section 3.636(b); that, if the proposal is permitted to stand, it will nullify the multiple ownership rule and reduce the Commission's orderly processes in considering competitive television applications to a state of chaos; that hearing processes would become more protracted by the addition of other parties to the proceeding and that applicants could file in excess of five applications, representing, only, that they would surrender any construction permits in excess of the number permitted by the Commission's Rules; that Storer does not present to the Commission at this time a plan of divestment which can be assessed by the Commission; that there is no assurance whatever that Storer can divest itself of one of its holdings and that, if it could, that the transferee thereof would be qualified under the Communications Act as a licensee; and that the effect of the Commission's actions in dismissing the Wheeling-Steubenville application and the prior Miami applications were dismissals with prejudice.

5. In its opposition, Storer alleges, in general, that its statement concerning its intention to dispose of one of its present stations in the event of a grant of its Miami application constitutes an unequivocal proposal to comply with the multiple ownership rules; that it has an historical and current interest in serving the public of the Miami area; that the *WSTV, Inc.*, decision re-
379 quiring it to elect between two conflicting and inconsistent applications is not applicable to the instant case where there is but one non-conflicting application before the Commission; that the Commission has consistently found that a proposal to divest an existing station upon the grant of an application satisfies the the requirements of the multiple ownership rule in cases where

a conflict would otherwise exist; that it does not propose to own, operate or control more television stations than permitted by the Commission's multiple ownership rule; that compliance with the Commission's ownership rule does not require that a proposal to dispose of an existing station in the event of a grant be accompanied by all conceivable detail concerning such proposed disposition; and that it has filed a complete and proper application upon which it is entitled to a comparative hearing with other mutually exclusive applications.

6. As indicated above, we have held that Storer could not own *four* television station and prosecute applications for two additional stations. Storer now urges that it be permitted to own *five* television stations and prosecute its application for another station. Aside from the reasons set forth below, the illogic and untenability of Storer's position is apparent on its face. We are of the view that Storer's present proposal does more violence to the spirit and purposes of Section 3.636(b) than the proposal we considered in the *WSTV, Inc., decisions, supra.*

7. We agree with Storer's contention that there being but one application before us, it is not inconsistent with any other pending Storer application and that Section 1.362 of our Rules is not applicable. It is equally clear, however, that in our decision in the *WSTV, Inc.,* cases, we did not base our conclusions solely upon the above rule. In those cases, we were concerned also with the possible effect a contrary holding would have on the Commission's procedures for processing applications, particularly in the television service. As we stated in our first decision in 8 Pike and Fischer R. R. 854:

> "A contrary rule would permit applicants to flood this Commission's processing line and its hearing docket with multiple applications many of which could not be granted under the rules. Such multiple applications, if entitled to consideration, would delay the processing of applications which could otherwise be granted. Hearings would be required to be held on the applications of such multiple applicants in situations where we could not grant such applications. * * *"

We are of the view that while the above-entitled application is not inconsistent with any other Storer application within the meaning of Section 1.362 of our Rules, processing and consideration thereof by the Commission would be inconsistent with its holding in the *WSTV, Inc.,* decisions, with its policy enunciated thereunder, and with the spirit and purposes of Section 3.636(b) of our Rules.

8. Storer's proposal to accept a grant of its application on condition that it dispose of one of its five television stations merely repeats one of the proposals it offered when it held four stations

and had two applications pending before us. That proposal was rejected before, 9 *Pike and Fischer R. R.* 175, 178 (fn. 6), and we are of the view that it is untenable now. For, acceptance of this proposal would permit the owner of five television stations to file an unlimited number of applications on the grounds that each time we granted an application we could attach the proposed condition. This could go on *ad infinitum*, disrupt entirely our processing procedures, be manifestly unfair to competing applicants, delay a first or additional television service in a number of communities, and encourage trafficking in licenses. It is clear to us that to permit such a situation to exist would not be in the public interest.

9. Storer has cited a number of instances wherein the Commission granted construction permits or transfers of control conditioned upon the disposition of an existing station. It is to be noted, however, that those applications did not involve Section 3.636(b) of our Rules. Those were cases in which the applicant sought another station in the same community on condition that he would dispose of his existing station. They did not involve multiple applications, did not do violence to our processing procedures, did not involve competing applicants and did not delay the establishment of a first or additional service in the community. A more analogous reference would be the decisions we have issued pursuant to Section 1.371, footnote 10, subsection 2(c) of our Rules which read as follows:

> 381 "An application by a licensee or the permittee of a television broadcast station which seeks to modify an outstanding license or permit to specify a channel other than that authorized in said license or permit will not be accepted for filing by the Commission, with the exception of applications filed pursuant to Commission Show Cause Orders."

In applying Subsection 2(c), we stated *In re Petition of The Vindicator Publishing Company*, 8 *Pike and Fischer R. R.* 328:

> "Paragraph (k) [now 2(c)] has been adopted to effectuate the expeditious development of television pursuant to the Table of Assignments. It prevents the waste of valuable television channels by insuring that the holder of a construction permit will either proceed with its existing authorization, or make that channel available to others before seeking to institute proceedings looking towards a grant on another channel. Petitioner could not, of course, simultaneously be given a construction permit or license for two different channels in the same community (Section 3.636 of the Rules and Regulations). Petitioner does not challenge the validity of that basic rule. The rule which prevents an applicant from holding one channel

while trying to obtain another is clearly reasonable on its face.[4] It is a reasonable procedural method of implementing both the purpose of Section 3.636 and the equitable and efficient processing of applications. Nor is the rule shown to be inequitable in this situation. Petitioner seeks to do exactly what the rule is intended to prevent, namely to stand astride two channels at the same time. * * *

The analogy to Subsection 2(c), above, is pertinent since there, too, we were concerned with a situation where an applicant might "straddle" two channels, adversely affect our processing procedures, do inequity to other applicants, and delay television service in a community. In the *Vindicator* case, the permittee sought another channel in lieu of the one granted to it while there was a pending application for the unassigned channel. There was no proposal by
382 the permittee to cancel the existing authorization. We refused to accept its application, as we did *In re Application of Broadcast House Inc.* (FCC 53-1427), where there were four applicants for the unassigned channel. And *In the Matter of Amendment of Subsection 2(c) of Footnote 10 etc.*, (53-1426), we denied a petition to amend Subsection 2 (c) on grounds similar to those set forth in the *Vindicator* case.

10. With respect to petitioner's contention that our actions in dismissing Storer's Wheeling-Steubenville application and its prior Miami application were dismissals with prejudices, we are not in accord. Those applications were dismissed pursuant to Section 1.366 of our Rules which provides, in pertinent part, that "Any application may be dismissed without prejudice as a matter of right prior to the designation of such application for hearing". However, in light of the Commission's final determination of the rulemaking proceedings in Docket 8967, adopted the same date of this Memorandum Opinion and Order, in which the Commission did not adopt Storer's proposed amendment to Section 3.636 of its Rules, no basis exists for the retention of Storer's application in the Commission's pending files. Accordingly, it will be returned forthwith.

11. In light of the above, IT IS ORDERED, That the application of Storer Broadcasting Company for Channel 10 in Miami, Florida, IS DISMISSED.

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[4] Since the rule is procedural, notice of proposed rule making was not required. See Section 4(a), Administrative Procedure Act."

FEDERAL COMMUNICATIONS COMMISSION

WM. F. MASSING,
Acting Secretaary.

Adopted: November 25, 1953
Released: November 30, 1953

383 In United States Court of Appeals for the District of Columbia Circuit

Federal Communications Commission
Washington 25, D. C.
November 5, 1954

Address all communications to the Secretary

Joseph W. Stewart, Clerk
United States Court of Appeals for the
District of Columbia Circuit
Washington 1, D. C.

Re: Storer Broadcasting Company v. United States and the Federal Communications Commission, No. 12065

Dear Mr. Stewart:

At the argument on November 2, 1954 of the above-entitled case mention was made of the amendment of Section 3.636 of the Commission's Rules and Regulations to permit the acquisition of two additional UHF television stations. The pendency of the proposal was referred to on Page 9 of the Government's brief and its adoption mentioned on Page 11 of the petitioner's reply brief.

It would seem desirable for the Court to have the citation for the Rule in its present form. The Report adopting the amendment together with the text of the Rule as amended is printed at 19 F.R. 6099. The Rule also appears at 1 Pike & Fischer, Radio Regulation 53:632 and the Report at 11 Pike & Fischer, Radio Regulation 1519. I have informed counsel for the petitioner of my intention to submit this information and have been advised that there is no objection.

Sufficient copies of this letter are enclosed for the Court's use. It would be very much appreciated if you would transmit these copies to the Court. This seemed to me to be the most expeditious way of furnishing the citations.

Very truly yours,

DANIEL R. OHLBAUM

cc: Thomas H. Wall, Esq.
Dow, Lohnes & Albertson
Munsey Building
Washington, D. C.

384 [File endorsement omitted]

In United States Court of Appeals for the District of Columbia Circuit

No. 12,065

STORER BROADCASTING COMPANY, Petitioner

v.

UNITED STATES OF AMERICA, and the FEDERAL COMMUNICATIONS COMMISSION, Respondents

Petition for Review of Order of the Federal Communications Commission

OPINION—Decided February 24, 1955

Mr. Albert R. Connelly, with whom Messrs. Thomas H. Wall and George B. Turner were on the brief, for petitioner. Messrs. Fred W. Albertson and Clair L. Stout entered appearances for petitioner.

Mr. Daniel R. Ohlbaum, Counsel, Federal Communications Commission, with whom Messrs. Warren E. Baker, General Counsel, Federal Communications Commission, and J. Smith Henley, Assistant General Counsel, Federal Communications Commission, were on the brief, for respondents. Messrs. Charles H. Weston, Attorney, Department of Justice, and J. Roger Wollenberg, Richard A. Solomon and Richard J. Snider, Counsel, Federal Communications Commission, entered appearances for respondents.

Before WILBUR K. MILLER, PRETTYMAN and BAZELON, Circuit Judges.

385 WILBUR K. MILLER, *Circuit Judge*: Storer Broadcasting Company filed with the Federal Communications Commission August 31, 1953, an application for a new television station in Miami, Florida. Storer was then already licensed to own and operate five standard broadcast and five frequency modulation broadcast stations, located in Atlanta, Detroit, Miami, Toledo and Wheeling; and three television stations, located in Atlanta, Detroit and Toledo. Its wholly-owned subsidiaries were then licensed to own and operate standard broadcast and television stations in Birmingham and San Antonio.

In a proceeding initiated some years before by issuance of a notice of proposed rule making, in which Storer participated, the Commission entered an order November 25, 1953, promulgating amended "multiple ownership" rules, which are now §§ 3.35, 3.240 and 3.636 of its Rules and Regulations. On the same day the Commission

dismissed Storer's application for a television station in Miami without a hearing and without consideration on the merits, on the ground that its grant would be in violation of the spirit and purpose of the multiple ownership rules.

Storer petitions for review, asking that we declare unlawful and without force or effect the Commission's rule making order of November 25, 1953, together with the amended multiple ownership rules promulgated thereby, insofar as and to the extent that the order and rules

> "(a) Deny the right to a full and fair hearing to determine whether ownership, operation or control of more than seven (7) standard radio, seven (7) FM radio, and five (5) television broadcast stations, upon application therefor, will serve the public interest, convenience or necessity
>
> "(b) Provide that ownership of one (1%) per cent or more of the voting stock of a corporation shall be considered as equivalent to ownership, operation or control of such station in determining the existence of a concentration of control
> 386 contrary to the public interest, convenience or necessity."

The multiple ownership rules are challenged here only insofar as they impose an absolute limitation upon the number of standard, FM and television broadcast stations which may be owned, operated or controlled by a single individual or corporation. The three rules under attack are similar except for the differing maximum numbers of stations which are permitted,—seven in standard, seven in FM, and five in television. We quote as typical the television broadcast rule, § 3.636:

> "Section 3.636 *Multiple Ownership*—(a) No license for a television broadcast station shall be granted to any party (including all parties under common control) if
>
> "(1) such party directly or indirectly owns, operates, or controls another television broadcast station which serves substantially the same area; or
>
> "(2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with the public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the

extent of other competitive service to the areas in question. *The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations.*" (Italics supplied. The italicized material is common to all three rules.)

387 Unequivocally, the foregoing rule declares that an application for a television broadcast station license filed by one who is already licensed for five such stations will be rejected; that the Commission will *in any event* consider that the addition of a sixth station would result in concentration of control contrary to the public interest, convenience or necessity.

This means, of course, that an application for a sixth television station will be denied without a hearing, just as Storer's application was rejected without a hearing and without any consideration of the question whether public interest, convenience or necessity would be served by the grant.

Section 309(a) of the Communications Act requires the Commission to grant an application for a station license if it finds, upon examination thereof, that public interest, convenience and necessity would be served by the granting thereof. If the Commission is unable so to find, after examining an application, it is required by § 309(b) of the Act to notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. It is further provided that, if the Commission, after considering the applicant's reply to its notice, is still unable to make a favorable finding and so is unable to grant the application without a hearing,

> ". . . it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue
388 specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant."

This is mandatory language. The Supreme Court said in *Ashbacker Radio Corp.* 1. F. C. C., 326 U. S. 327, 330 (1945):

> " . . . § 309(a) not only gives the Commission authority to grant licenses without a hearing, but also gives applicants a right to a hearing before their applications are denied. . . . "

Again, at page 333, the Court said:

> " . . . Congress has granted applicants a right to a hearing on their applications for station licenses. Whether that is wise policy or whether the procedure adopted by the Commission in this case is preferable is not for us to decide. . . . "

Moreover, the denial of a hearing granted by statute is a denial of due process of law. *L. B. Wilson, Inc.* v. *F. C. C.*, 83 U.S. App. D.C. 176, 170 F. (2d) 793 (1948).

This does not mean, however, that any person who applies for any frequency at any location is entitled to a hearing before his application may be denied, for there are situations in which the Commission may reject an application without a hearing. For example, if an applicant admits he is an alien, his application will be denied without a hearing because he is disqualified by statute; or, if he denies he is an alien but is found to be such after a hearing conducted on that issue, his application will be dismissed without further hearing.

If an application seeks a license for an unlawful use or purpose, it will be rejected without a hearing. *F. C. C.* v. *American Broadcasting Co.*, 347 U. S. 284 (1954).

Moreover, if an applicant applies for a certain frequency at a location to which that frequency has not been assigned, his application will be dismissed without a hearing as not conforming to the Commission's master plan—arrived at through one
389 master hearing—for the allocation of television frequencies, under which at least one television channel has been assigned to each of over one thousand cities and towns throughout the nation. The actual assignment of channels to operators is by application, but all applications for licenses not conforming to the overall plan are automatically dismissed. This plan was upheld by us in *Peoples Broadcasting Co.* v. *United States*, 93 U. S. App. D. C. 78, 209 F. (2d) 286 (1953), and in *Logansport Broadcasting Corp.* v. *United States*, 93 U. S. App. D. C. 342, 210 F. (2d) 24 (1954).

In the latter case we said, at page 345:

> "The fair interpretation of Sections 303 and 307 (b), when read together, is that the Commission may allocate channels among communities either by passing upon specific applications or by way of rule making. Situations are not infrequent

in which an administrative agency can properly proceed either through rule making or adjudication; in such a case, the choice 'is one that lies primarily in the informed discretion of the administrative agency.' Securities and Exchange Commission v. Chenery Corporation, 1947, 332 U. S. 194, 203, 67 S. Ct. 1575, 1580, 1760, 91 L. Ed. 1995. After its experience in distributing FM radio frequencies pursuant to an allocation plan, and distributing AM frequencies in response to specific applications, the Commission has decided that by means of an allocation plan a more equitable distribution of television channels can be effected. We do not think this was an abuse of discretion. . . ."

In the light of such exceptions to the apparently unqualified generality of § 309(b), the statutory provision means that any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected.[1]

390 The rule in question here is not a mere announcement that the Commission has adopted the policy of considering, in every case in which the owner of five television stations applies for an additional license, whether the grant thereof would result in such concentration of control as to be adverse to the public interest. The rule goes further and says the Commission will "in any event" treat the numerical limit as the boundary of public interest, and will deny a hearing to the owner of five television stations upon his application for an additional station. Thus the Commission freezes into a binding rule a limitation upon its consideration of the public interest in a respect in which the facts and circumstances may differ widely from case to case. It has decided *in vacuo* that there can never be an instance in which public interest, convenience and necessity would be served by granting an additional license to one who is already licensed for five television stations. The power so to decide has not been committed to the Commission.[2]

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[1] Cf. *Stahlman v. F. C. C.*, 75 U. S. App. D. C. 176, 126 F. (2d) 124 (1942).

[2] Cf. the *Stahlman* opinion, cited in footnote 1, in which Judge Groner said, at page 179:

"If in this case it had been made to appear, as counsel for appellant insist, that the Commission's investigation was solely for the purpose of the consideration or adoption of a hard and fast rule or policy, as the result of which newspaper owners may be placed in a proscribed class and thus made ineligible to apply for or receive broadcast licenses, we should

It is conceivable that in some circumstances, common ownership of even five television stations, though permitted by the challenged rule, might be undue concentration of control; while in other circumstances, common ownership of a greater number might be compatible with the public interest. But whether so or not must be determined on an *ad hoc* basis, after consideration of all factors relevant in the determination of whether the grant of a license would be within the comprehensive concept which the Act calls "the public interest, convenience, or necessity." Cf. *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 89 U. S. App. D. C. 13, 189 F. (2d) 677 (1951), as to the broad scope of the concept. The selection of a certain number, such as five or seven, as a maximum beyond which no multiple owner will be permitted to go regardless of what he may be able to show in his own behalf, is not only inconsistent with but is contrary to the mandatory provisions of § 309(b) of the Act and, with respect to the applicants described in the rule, would in effect repeal or nullify that important section.

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The Commission argues that the challenged rules[3] carry out its established policy of encouraging as many qualified persons as possible to seek broadcast licenses, as the public interest requires maximum diversification of program and service viewpoints; and that they also carry out the general policy of favoring competition which Congress wrote into the Communications Act. The multiple ownership rules are, the Commission says, "therefore a formulation of *Commission* policy in the licensing of stations, which is based in part upon enunciated Congressional policy applicable to radio broadcasting." We are not here concerned with the Commission's *policy* in passing upon applications. We are concerned with what purports to be a binding rule.

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be obliged to declare that such an investigation would be wholly outside of and beyond any of the powers with which Congress had clothed the Commission. For we have previously held that there is nothing in the Act which either prevents or prejudices the right of a newspaper, as such, to apply for and receive a license to operate a radio broadcast station. Tri-State Broadcasting Co. v. Federal Communications Comm., 68 App. D. C. 292, 96 F. 2d 564. Further consideration confirms that view."

[3] Although only § 3.636 of the Commission's Rules, concerning multiple ownership of television stations, is directly involved here; the parties have treated the case as though all three sections of the multiple ownership rules were under direct attack. As the challenged portion of § 3.636 appears *verbatim* in the other two sections, it would of course be held invalid should occasion arise to consider it on the complaints of multiple owners of AM and FM stations.

However laudable its policies may be, we have seen that the Commission is bound by its own statute and by the requirements of due process to grant a full hearing before denying an application for an available frequency sought by a citizen for a lawful use. We hold invalid the portion of § 3.636 of the Commission's Rules which we italicized in quoting it at length earlier in this opinion, and direct that it be eliminated therefrom. This holding will not prevent the Commission from considering in each case, in accordance with its announced policy, the question whether granting an additional license to one who is already a multiple owner would place too much control in one licensee, contrary to the public interest. But the multiple owner applicant must be given a chance in a hearing to show, if he can, that still another station will not give him such control of communications media as to prejudice the interests of the public.

This proceeding, being on petition for review of the rule making order of November 25, 1953, filed under § 402(a) of the Act, does not bring before us the order of the same date which denied the application of Storer Broadcasting Company for a television station license at Miami—which order was appealable under § 402(b). But, in view of our holding here, the Commission probably will *sua sponte* set aside the order of denial and grant Storer a hearing.

Challenged rule modified and case remanded.

393 [File endorsement omitted]

In United States Court of Appeals for the District of Columbia Circuit

No. 12,065

January Term, 1955.

STORER BROADCASTING COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

JUDGMENT—February 24, 1955

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

On Consideration Whereof, it is hereby ordered and adjudged by this Court that the order of the Federal Communications Commission adopted November 25, 1953, so far as it amends Section 3.636 of its Rules and Regulations by including therein the following language:

> "The Commission, however, will in any event consider that there would be such a concentration of control contrary to the

public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations."

be, and the same is hereby, determined to be invalid, and that this case be, and it is hereby, remanded to the Federal Communications Commission with directions to eliminate the foregoing language from Section 3.636 of its Rules and Regulations.

Dated: February 24, 1955.

Per *Circuit Judge* WILBUR K. MILLER.

394 [File endorsement omitted]

In United States Court of Appeals

[Title omitted]

Before: EDGERTON, *Acting Chief Judge*, in Chambers.

ORDER STAYING ISSUANCE OF CERTIFIED COPIES OF OPINION AND JUDGMENT.—Filed March 15, 1955

Upon consideration of respondents' motion to stay issuance of certified copies of the opinion and judgment of this Court on the ground that respondents are considering applying to the Supreme Court of the United States for a writ of certiorari, and it appearing that petitioner has consented thereto, it is

Ordered by the Court that issuance of certified copies of the opinion and judgment of this Court in the above entitled case be, and it is hereby, stayed to April 11, 1955.

Dated: March 15, 1955.

395-396 Designation of Record (omitted in printing).

397 Clerk's Certificate to foregoing transcript omitted in printing.

398 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 94

[Title omitted]

ORDER ALLOWING CERTIORARI.—Filed October 10, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

STORER BROADCASTING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington 25, D. C.

WARREN E. BAKER,
General Counsel,
Federal Communications Commission,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

STORER BROADCASTING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States of America and the Federal Communications Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 24, 1955.

OPINION BELOW

The opinion of the Court of Appeals (App. 1a-12a) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1955 (App. 13a-14a). The jurisdiction of this Court is invoked under 5 U.S.C. 1040 and 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether Section 309(b) of the Communications Act of 1934, which requires a hearing before the denial of an application for a radio station license, prevents the Federal Communications Commission from adopting regulations fixing limitations on the multiple ownership of radio facilities.

STATUTE AND REGULATIONS INVOLVED

The pertinent sections of the Communications Act of 1934, as amended, 48 Stat. 1064, 50 Stat. 191, 66 Stat. 715, 47 U. S. C. 151, *et seq.* are as follows:

Section 4(i):

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions. [47 U. S. C. 154(i)]

Section 303:

> Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> * * * * *
>
> (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: * * *
>
> * * * * *
>
> (r) Make such rules and regulations and

prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, * * *. [47 U. S. C. 303]

Section 309(b):

If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. * * * [47 U. S. C. 309(b)]

The pertinent portion of Regulation Section 3.636 *Multiple Ownership*[1] provides:

> (a) No license for a television broadcast station shall be granted to any party (including all parties under common control *) if
>
> * * * * *
>
> (2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event con-

* The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

[1] The corresponding rules dealing with multiple ownership of standard broadcast stations and FM broadcast stations are contained in Sections 3.35 and 3.240. (47 C.F.R. 3.35, 3.240) They are the same as the television station rule except that the maximum limit was fixed at seven.

All three rules contain separate provisions against the ownership of more than one station serving substantially the same area. This provision was not challenged in the present case.

sider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations.** [47 C.F.R. 3.636]

** In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1% or more of the outstanding voting stock.

STATEMENT

This petition seeks review of a judgment invalidating that part of the so-called multiple ownership rules of the Federal Communications Commission which provides limitations on the number of broadcast stations in which any person may have an interest. Rules 3.35, 3.240, and 3.636, *supra*, pp. 4-5. Although the opinion and judgment of the court below is directed specifically to the rule relating to the television broadcast service (Rule 3.636), it necessarily has the effect of invalidating the similar limitations contained in the rules governing the standard broadcast (AM) and frequency modulation (FM) services, as the court below pointed out (App. 3a).

The action was initiated by a petition filed by Storer Broadcasting Company (hereinafter referred to as Storer) under Section 402(a) of the Communications Act of 1934 (47 U. S. C. 402(a)) and Section 4 of the Act of December 29,

1950, 64 Stat. 1129, 1130 (5 U. S. C. 1034) for review of an order[2] of the Commission adopted November 25, 1953, promulgating revised rules with respect to the multiple ownership of radio and television broadcast stations.

The rules in question limit the maximum number of interests which any one person may have in broadcast stations licensed by the Commission. They apply, respectively, to standard broadcast (AM) and frequency modulation (FM) radio stations, and television broadcast stations, and provide that one person may not have an interest in more than a total of seven AM stations, seven FM stations and five television stations.[3] Storer was itself the licensee in its own name of five AM stations, five FM stations, and three television stations. Its wholly owned subsidiaries were the licensees of two standard broadcast stations and two television stations. It was obviously affected by the rule; in fact, on the same day the Commis-

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[2] The Commission's Report and Order adopting the amended rules is at 18 F.R. 7796. It is printed in the Joint Appendix filed below and will be referred to there as "R. 20-38".

[3] At the time the petition for review was filed, the television limitation was five stations. Before the oral argument of the case, the television rule was amended to permit the acquisition of two additional television stations, so long as they were in the ultra high frequency (UHF) band. The television rule thus presently permits a total of seven television stations, only five of which may be in the very high frequency (VHF) band. The report adopting this amendment is at 19 F.R. 6099. Storer had five VHF stations when the present action was brought. When the latest amendment was adopted, it acquired two additional UHF stations by purchase.

sion adopted the amended multiple ownership rules, it dismissed without hearing a pending application by Storer for an additional television station in Miami (R. 10).[4]

The proceeding leading to the amendment of the rules to their present form was conducted in compliance with the rule making requirements of the Administrative Procedure Act, and no question of any procedural deficiency has been raised. A notice of proposed rule making (R. 17) was followed by the filing of comments of interested parties, including Storer under the name of Fort Industry Co. Those parties also participated in oral argument held by the Commission *en banc*.

The Commission's Report and Order adopting the amended rules discussed the various considerations underlying their adoption, including the Commission's authority to promulgate the rules (R. 21-24); the reasons for rejecting alternative proposals to give effect to additional considerations such as size, class and geographical location of stations (R. 26-27); the reason why the rules make no distinction between controlling and non-controlling interests (R. 27-28); and the specific maximum limitations imposed (R. 30-32). The "fundamental purpose" of the limitations was stated by the Commission to be "to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any

[4] Storer did not appeal from this dismissal.

undue concentration of economic power contrary to the public interest." (R. 26)[5]

The Court of Appeals invalidated the provision which states that the Commission will in any event consider that there would be a concentration of control contrary to the public interest for any per-

[5] The Commission's Report and Order set forth the basic considerations of policy underlying the rules in the following terms (R. 26): "One of the basic underlying considerations in the enactment of the Communications Act was the desire to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcasting system on a free competitive basis. See *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470. This Commission has consistently adhered to the principle of 'diversification' in order to implement the Congressional policy against monopoly and in order to preserve competition. That principle requires a limitation on the number of broadcast stations which may be licensed to any person or to persons under common control. It is our view that the operation of broadcast stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees. The vitality of our system of broadcasting depends in large part on the introduction into this field of licensees who are prepared and qualified to serve the varied and divergent needs of the public for radio service. Simply stated, the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest. In this connection, we wish to emphasize that by such rules diversification of program services is furthered without any governmental encroachment on what we recognize to be the prime responsibility of the broadcast licensee (See Section 326 of the Communications Act). It is to effect this purpose that the foregoing specific limitation on the number of stations that may be owned, operated or controlled by any person, has been included in the multiple ownership rules."

son to have an interest in more than the specified number of stations.[6] The court's decision is based upon the sole ground that Section 309(b) of the Communications Act requires a hearing before an application may be denied and that "the statutory provision means that any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected." (App. 8a). The decision is not based upon rejection of the reasonableness of these particular rules or the adequacy of the record to support the specific provisions of the rules. In this connection, the opinion states that however laudable the Commission's policy may be, the Court is not concerned with the Commission's policy in passing upon applications, but is concerned with what purports to be a binding rule which denies an application for an available frequency sought by a citizen for a lawful use, and which does so without the full hearing on the application which the court thought was required by Section 309(b) of the Act (App. 11a).

REASONS FOR GRANTING THE WRIT

1. The decision below is a far-reaching one which imposes a drastic limitation upon the exercise of the Commission's rule making powers. It not only strikes down the particular rules involved, but also declares as a binding rule of law that the Commis-

[6] The court below made no express mention of the provision in the rules that all interests, except interests of less than 1% in corporations with more than fifty voting stockholders, will be taken into consideration.

sion cannot utilize its rule making authority to adopt general standards for the disposition of applications for radio and television licenses except in severely limited situations (see pp. 19-20, *infra*).[7] The question of the Commission's authority to adopt rules of general applicability which delineate standards of the public interest to be applied in individual licensing proceedings is of major importance in the administration of the Communications Act.[8] Commission rules govern the disposition of individual applications in the issuance of all classes of radio and television licenses, in both the broadcast and nonbroadcast services. The decision of the court below strikes

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[7] Since the decision in the instant case, the court below has, on the authority of the present case, reversed an order of the Commission issued without a hearing refusing to waive compliance with a rule limiting the nature of transmitting equipment. *City of New York Municipal Broadcasting System* v. *Federal Communications Commission*, May 5, 1955.

[8] The Attorney General's Committee on Administrative Procedure, in its monograph, *Administrative Procedure in Government Agencies*, Part 3, Federal Communications Commission (Senate Document No. 186, 76th Cong., 3d Sess.), stated at page 61: "The Communications Act of 1934 is replete with provisions vesting power in the Commission to make rules and regulations, and the Commission's authority in this respect covers the entire gamut of administrative legislation." And at page 63: "The entire process of licensing, both of stations and operators, is to be dealt with by Commission regulations."

The task force Report on Legal Services and Procedure prepared for the Commission on Organization of the Executive Branch of the Government in March 1955 states (p. 157), "In many respects, the power of agencies to issue rules is scarcely less important than the actions of the legislature itself. Rules, no less than statutes, lay down standards of conduct for all to whom their terms apply, *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 418 (1942)."

at the heart of this authority to effectuate the efficient administration of the Act through the use of general rules.

Putting aside for the moment the broad effect of the decision below on the Commission's general rule making authority, it clearly is of great importance even in the context of the particular rules which have been set aside here, substantially on the ground that the Commission lacks any power to make general rules in aid of its licensing functions. The multiple ownership rules have embodied for approximately fifteen years the Commission's view that multiple ownership interests above the permitted maximums are detrimental to the public interest.[9] These rules provide a framework, an-

[9] The Commission's multiple ownership rules date back to 1940, when a rule pertaining only to FM stations was adopted. This rule was similar in form to the present rules and provided that no person should own or control more than one station, except upon a showing that competition would be fostered or a distinct service rendered, and that an undue concentration of control would not result. It provided further that the ownership or control of more than six stations would be considered a concentration of control inconsistent with the public interest. In 1941 a substantially similar rule was adopted for television stations. The maximum number was originally set at three, and was raised to five in 1944. A multiple ownership rule for AM stations, adopted in 1943, contained only the restriction provided by the two earlier rules against ownership or control of more than one station serving the same area, and did not contain a maximum limitation. The changes in the rules made in the November 1953 amendment adopted a maximum of seven instead of six in the FM service, fixed a maximum in the AM service for the first time, and extended the rules to include minority as well as controlling interests. The television maximum was not changed at that time but, as is pointed out in footnote 3, *supra*, p. 6, has since been raised to seven.

nounced in advance, for the healthy, competitive development of radio and television broadcasting in the United States.

As this Court has stated, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 203. Here, acting on the basis of its experience with a problem peculiarly suited to the exercise of that informed expert judgment which it was created to exercise, the Commission has determined that multiple ownership can best be handled by regulation. Returning the problem to the uncertainties of case-by-case adjudication would open the door to individual hearings in a realm where particular evils are not readily susceptible of proof on an individual case basis.[10] The multiple ownership rules are soundly based on considerations within the competence of the Commission in granting licenses for the use of scarce channels of radio communication. The court below did not find that they were not.

The rules have two bases. First, they serve to preserve the fullest measure of economic competition and to prevent the development of any trend toward monopoly. In this sense, the rules are an ap-

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[10] The preventative role of the rules is similar to that of 15 U.S.C. 19, where Congress announced a general rule prohibiting interlocking directorates in certain situations. See *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614 S.D. N.Y.).

plication by the Commission of the same basic policy considerations underlying the Federal antitrust laws, although, of course, they are not a direct application of those laws and do not purport to define a violation of the antitrust laws.[11] The authority of the Commission to provide for the fullest use of radio in the public interest through a licensing policy reflecting the basic concept of competition is well established. *National Broadcasting Co.* v. *United States*, 319 U. S. 190; *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28 (C.A. D. C.). In preserving competition by preventing aggregations of control which, while not illegal, tend toward concentration of economic power contrary to the public interest, the multiple ownership rules represent a particularization of the Commission's conception of the public interest sought to be safeguarded by Congress in enacting the Communications Act.

Second, and of at least equal importance as a foundation for the rules, is their function of implementing the Commission's settled policy in licens-

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[11] By Section 313 of the Communications Act, Congress expressly made the antitrust laws applicable to persons engaged in radio communications, and authorized the courts to revoke the license of any person found guilty of violating the antitrust laws. In Section 311, it directed the Commission to refuse a station license to any person whose license has been revoked by a court under Section 313. These provisions leave no room for doubt that Congress intended to adopt a policy of free competition for the radio broadcasting industry. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137; *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474.

ing broadcast station of promoting and insuring diversification of program and service viewpoints. As the Commission's report states, it is a fundamental purpose of the limitation on the multiple ownership of stations to promote diversification of ownership interests in order to increase diversification of program and service viewpoints (R. 26). The principle of diversification is one which the Commission has consistently applied in a variety of contexts, and its adherence to this policy has received judicial approval. Thus, although newspapers have never been barred as a class, in recognition of the fact that newspapers also constitute a critical avenue of communication to the public which, while dissimilar to radio in many respects, also performs similar functions of imparting news and opinion, the Commission has consistently favored applicants without newspaper connections in selecting among competing applicants for a license. This policy has been sustained upon review. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 189 F. 2d 677 (C.A. D.C.), certiorari denied, 342 U. S. 830.[12] In comparative hearings between qualified applicants, the Commission has also followed the consistent practice of considering whether an applicant already had other radio interests, even though such interests are permitted by the maximum limitations in the multiple owner-

[12] As was there pointed out, this Court has stated in *Associated Press* v. *United States*, 326 U.S. 1, 20, that the First Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.

ship rules. See, e.g., *Bamberger Broadcasting Service, Inc.*, 11 F. C. C. 211, 222; *Plains Radio Broadcasting Co.* v. *Federal Communications Commission*, 175 F. 2d 359 (C.A. D.C.).

However, the decision below has a far greater impact than merely invalidating one set of rules. The court below, while specifically refusing to consider the reasonableness and validity of the policy which the rules enunciate, held them invalid on the sole ground that Section 309(b) of the Communications Act requires an adjudicatory hearing in every case where a citizen seeks a license for the lawful use of an available frequency. This broad holding affects the Commission's regulations governing the licensing of stations in all classes of service, including the many safety and special non-broadcast services, as well as stations licensed to broadcast directly to the general public. Section 309(b) applies equally to the issuance of licenses for all such services. The Commission must pass upon thousands of applications each year, covering the entire range of the use of radio signals for such diverse purposes as broadcasting to the public, fire and police services, and industrial uses. The publication of standards under which these applications will be considered is a convenience to the public and a means by which the Commission can handle the great volume of work with efficiency.

2. The holding below is contrary to every relevant decision of this Court and the lower courts on the question of the Commission's authority to promulgate rules of general applicability which

govern the disposition of individual applications. It has long been established that the Commission has authority, in conjunction with its licensing functions, to adopt general rules declarative of standards relevant to the public interest which govern the grant or denial of individual license applications. This authority is specifically given in Sections 4(i) and 303 of the Act, *supra*, p. 2. It has also been established that such rules may go beyond the purely technical aspects of radio transmissions, and that the denial of an application because of conflict with such a rule, without reopening all of the considerations going into the rule on a case-to-case basis, is not a violation of the right to a hearing on an application accorded by Section 309(b) of the Communications Act. A hearing would of course be held, where appropriate, on the question of whether the application is in fact in violation of the rule.

The leading case on the Commission's rule making power is *National Broadcasting Co.* v. *United States*, 319 U.S. 190, which sustained the Commission's Chain Broadcasting Regulations. The Chain Broadcasting Regulations were designed to eradicate certain practices in network broadcasting which the Commission found to be inimical to the public interest. They are exactly the same in their application to license applications as the multiple ownership rules, and provide that "no license shall be granted" to stations or applicants having certain contractual relationships with network organizations. That the network rules, adopted in

1941 and sustained by this Court in the *National Broadcasting Co.* case, *supra*, operate precisely as do the present rules, which the lower court struck down because of an asserted conflict with the hearing requirement of Section 309(b), is made clear by this Court's decision in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, holding the Chain Broadcasting Regulations directly reviewable prior to the denial of any individual license application. The Government had contended that the Chain Broadcasting Regulations were not directly reviewable because they were merely "announcements of policy." But this Court rejected that contention in *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, holding those rules reviewable on the ground that they were "rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the grounds specified in the regulations without more." (316 U.S. at 418.)[13] Moreover,

[13] The Court's opinion further states on the question of the effect of the rules as requiring the denial of applications which are inconsistent with them (316 U.S. at 422): "The Commission argues that, since its Report characterized the regulations as announcements of policy, the order promulgating them is no more subject to review than a press release similarly announcing its policy. Undoubtedly, regulations adopted in the exercise of the administrative rule-making power, like laws enacted by legislatures, embody announcements of policy. But they may be something more. When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command and accompanied by an announcement of the Commission that the policy is one 'which we will follow in exercising our licensing power,' they must be taken by those entitled to rely upon them as what they pur-

Judge Learned Hand stated in the District Court opinion sustaining the Chain Broadcasting Regulations, with respect to the same contention that the Commission's duty to give a hearing before denying an application meant that the Commission could not make rules of general applicability (*National Broadcasting Co.* v. *United States*, 47 F. Supp. 940, at 945 (S.D. N.Y.)):

> The plaintiffs next challenge the regulations because they lay down general conditions for the grant of licenses instead of reserving decision until the issues arise upon an application. Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future. * * *

The Commission's authority to make rules which are binding in licensing proceedings has also been sustained in several other cases. In *Federal Communications Commission* v. *American Broadcasting Company*, 347 U.S. 284, 289, this Court recognized the Commission's authority to adopt rules providing that an application for license or renewal of license would not be granted where a

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port to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them. The Commission's contention that the regulations are no more reviewable than a press release is hardly reconcilable with its own recognition that the regulations afford legal basis for cancellation of the license of a station if it renews its contract with appellant."

policy of broadcasting lotteries is followed. And, again, the Commission's rules providing that a license will not be granted upon the transfer of a station, where the transferor reserves any right of re-assignment of the license or a right to use the facilities of the station assigned, have also been upheld. *Felman* v. *United States* (unreported, Civil No. 49 C 227, N.D. Ill.), affirmed, 339 U.S. 973. Finally, in *Logansport Broadcasting Corporation* v. *United States,* 210 F. 2d 24, the Court of Appeals for the District of Columbia itself sustained the Commission's rules providing for a nation-wide system of allocating television frequencies. These rules require that applications for licenses not conforming to the overall plan be automatically dismissed.[14] See also *Heitmeyer* v. *Federal Communications Commission,* 95 F. 2d 91, in which the Court of Appeals reversed a Commission opinion denying an application where the applicant proposed to use borrowed funds, and the court criticized the Commission for its failure to promulgate any general rule as to minimum financial qualifications of applicants for licenses.

The opinion of the court below in the instant case concedes that there are some situations where an application may be rejected without a hearing, despite the hearing requirement of Section 309(b).

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[14] In its opinion in the present case, the court below recognized the rules involved in the *Logansport* case as an exception to the hearing requirement but failed to indicate in what respect the power of the Commission with respect to those rules differed from its power with respect to multiple ownership.

These situations are said to be those cases where an admitted alien applies (in violation of Section 310(a) of the Act), where an application seeks a license for an unlawful use (and the court here refers to the lottery rules), or where an applicant applies for a frequency at a location to which that frequency has not been assigned under the television assignment plan. These purported exceptions to the court's stated general rule cannot be distinguished, either legally or logically, from the multiple ownership rules.

3. The power to make effective rules which are more than precatory announcements of policy is a necessary adjunct of the licensing function, and the discretion of an administrative agency to utilize general rules instead of individual proceedings where the purpose is to cover matters of general applicability is well recognized. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194. Impairment of the role played by rules in setting forth, in advance of the filing of individual applications, the standards under which they will be granted, and the resulting necessity of holding hearings on matters which may appropriately be covered by general rules would impair the administrative process. The real question in this case is whether, where the Commission has authority to deny a license upon the basis of considerations within its competence, it may exercise that power through a rule of general applicability adopted by the rule making process authorized by Congress. We submit that the question is one of

general significance and that the decision below warrants review by this Court.

CONCLUSION

The decision below is contrary to established precedent on a question of basic importance to the administration of the Communications Act of 1934. It is respectfully submitted that the petition for certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

WARREN E. BAKER,
General Counsel,
Federal Communications Commission.

MAY, 1955.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,065

STORER BROADCASTING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, AND THE FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petition for Review of Order of the Federal Communications Commission

Decided February 24, 1955

Mr. Albert R. Connelly, with whom *Messrs. Thomas H. Wall* and *George B. Turner* were on the brief, for petitioner. *Messrs. Fred W. Albertson* and *Clair L. Stout* entered appearances for petitioner.

Mr. Daniel R. Ohlbaum, Counsel, Federal Communications Commission, with whom *Messrs. Warren E. Baker,* General Counsel, Federal Communications Commission, and *J. Smith Henley,* Assistant General Counsel, Federal Communications Commission, were on the brief, for respondents. *Messrs. Charles H. Weston,* Attorney, Department

of Justice, and *J. Roger Wollenberg, Richard A. Solomon* and *Richard J. Snider*, Counsel, Federal Communications Commission, entered appearances for respondents.

Before WILBUR K. MILLER, PRETTYMAN and BAZELON, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* Storer Broadcasting Company filed with the Federal Communications Commission August 31, 1953, an application for a new television station in Miami, Florida. Storer was then already licensed to own and operate five standard broadcast and five frequency modulation broadcast stations, located in Atlanta, Detroit, Miami, Toledo and Wheeling; and three television stations, located in Atlanta, Detroit and Toledo. Its wholly-owned subsidiaries were then licensed to own and operate standard broadcast and television stations in Birmingham and San Antonio.

In a proceeding initiated some years before by issuance of a notice of proposed rule making, in which Storer participated, the Commission entered an order November 25, 1953, promulgating amended "multiple ownership" rules, which are now §§ 3.35, 3.240 and 3.636 of its Rules and Regulations. On the same day the Commission dismissed Storer's application for a television station in Miami, without a hearing and without consideration on the merits, on the ground that its grant would be in violation of the spirit and purpose of the multiple ownership rules.

Storer petitions for review, asking that we de-

clare unlawful and without force or effect the Commission's rule making order of November 25, 1953, together with the amended multiple ownership rules promulgated thereby, insofar as and to the extent that the order and rules

> "(a) Deny the right to a full and fair hearing to determine whether ownership, operation or control of more than seven (7) standard radio, seven (7) FM radio, and five (5) television broadcast stations, upon application therefor, will serve the public interest, convenience or necessity.
>
> "(b) Provide that ownership of one (1%) per cent or more of the voting stock of a corporation shall be considered as equivalent to ownership, operation or control of such station in determining the existence of a concentration of control contrary to the public interest, convenience or necessity."

The multiple ownership rules are challenged here only insofar as they impose an absolute limitation upon the number of standard, FM and television broadcast stations which may be owned, operated or controlled by a single individual or corporation. The three rules under attack are similar except for the differing maximum numbers of stations which are permitted,—seven in standard, seven in FM, and five in television. We quote as typical the television broadcast rule, § 3.636:

> "Section 3.636 *Multiple Ownership*—(a) No license for a television broadcast station shall

be granted to any party (including all parties under common control) if

"(1) Such party directly or indirectly owns, operates, or controls another television broadcast station which serves substantially the same area; or

"(2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with the public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. *The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations.*" (Italics supplied. The italicized material is common to all three rules.)

Unequivocally, the foregoing rule declares that an application for a television broadcast station license filed by one who is already licensed for five such stations will be rejected; that the Commission will *in any event* consider that the addition of a sixth station would result in concentration of control contrary to the public interest, convenience or necessity.

This means, of course, that an application for a sixth television station will be denied without a hearing, just as Storer's application was rejected without a hearing and without any consideration of the question whether public interest, convenience or necessity would be served by the grant.

Section 309(a) of the Communications Act requires the Commission to grant an application for a station license if it finds, upon examination thereof, that public interest, convenience and necessity would be served by the granting thereof. If the Commission is unable so to find, after examining an application, it is required by § 309(b) of the Act to notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. It is further provided that, if the Commission, after considering the applicant's reply to its notice, is still unable to make a favorable finding and so is unable to grant the application without a hearing,

> ". . . It shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such

action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant."

This is mandatory language. The Supreme Court said in *Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. 327, 330 (1945):

". . . § 309(a) not only gives the Commission authority to grant licenses without a hearing, but also gives applicants a right to a hearing before their applications are denied. . . ."

Again, at page 333, the court said:

". . . Congress has granted applicants a right to a hearing on their applications for station licenses. Whether that is wise policy or whether the procedure adopted by the Commission in this case is preferable is not for us to decide. . . ."

Moreover, the denial of a hearing granted by statute is a denial of due process of law. *L. B. Wilson, Inc.* v. *F. C. C.*, 83 U. S. App. D. C. 176, 170 F. (2d) 793 (1948).

This does not mean, however, that any person who applies for any frequency at any location is entitled to a hearing before his application may be denied, for there are situations in which the Commission may reject an application without a hearing. For example, if an applicant admits he is an alien, his application will be denied without a hearing because he is disqualified by statute; or, if he denies he is an alien but is found to be such after a hearing conducted on that issue, his application will be dismissed without further hearing.

If an application seeks a license for an unlawful use or purpose, it will be rejected without a hearing. *F. C. C.* v. *American Broadcasting Co.*, 347 U. S. 284 (1954).

Moreover, if an applicant applies for a certain frequency at a location to which that frequency has not been assigned, his application will be dismissed without a hearing as not conforming to the Commission's master plan—arrived at through one master hearing—for the allocation of television frequencies, under which at least one television channel has been assigned to each of over one thousand cities and towns throughout the nation. The actual assignment of channels to operators is by application, but all applications for licenses not conforming to the overall plan are automatically dismissed. This plan was upheld by us in *Peoples Broadcasting Co.* v. *United States*, 93 U. S. App. D. C. 78, 209 F. (2d) 286 (1953), and in *Logansport Broadcasting Corp.* v. *United States*, 93 U. S. App. D. C. 342, 210 F. (2d) 24 (1954).

In the latter case we said, at page 345:

> "The fair interpretation of Sections 303 and 307 (b), when read together, is that the Commission may allocate channels among communities either by passing upon specific applications or by way of rule making. Situations are not infrequent in which an administrative agency can properly proceed either through rule making or adjudication: in such a case, the choice 'is one that lies primarily in the informed discretion of the administrative agency.' Securities and Exchange Commission v. Chenery Corporation, 1947, 332 U. S. 194, 203, 67 S. Ct. 1575, 1580, 1760, 91 L. Ed. 1995. After its experience in distributing FM radio frequencies pursuant to an allocation plan, and distributing AM frequencies in response to specific applications, the Commission has decided that by means of an allocation plan a more equitable distribution of television channels can be effected. We do not think this was an abuse of discretion. . . ."

In the light of such exceptions to the apparently unqualified generality of § 309(b), the statutory provision means that any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected.[1]

The rule in question here is not a mere announce-

[1] Cf. *Stahlman* v. *F. C. C.*, 75 U. S. App. D. C. 176, 126 F. (2d) 124 (1942).

ment that the Commission has adopted the policy of considering, in every case in which the owner of five television stations applies for an additional license, whether the grant thereof would result in such concentration of control as to be adverse to the public interest. The rule goes further and says the Commission will "in any event" treat the numerical limit as the boundary of public interest, and will deny a hearing to the owner of five television stations upon his application for an additional station. Thus the Commission freezes into a binding rule a limitation upon its consideration of the public interest in a respect in which the facts and circumstances may differ widely from case to case. It has decided *in vacuo* that there can never be an instance in which public interest, convenience and necessity would be served by granting an additional license to one who is already licensed for five television stations. The power so to decide has not been committed to the Commission.[2]

It is conceivable that in some circumstances, com-

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[2] Cf. the *Stahlman* opinion, cited in footnote 1, in which Judge Groner said, at page 179:

"If in this case it had been made to appear, as counsel for appellant insist, that the Commission's investigation was solely for the purpose of the consideration or adoption of a hard and fast rule or policy, as the result of which newspaper owners may be placed in a proscribed class and thus made ineligible to apply for or receive broadcast licenses, we should be obliged to declare that such an investigation would be wholly outside of and beyond any of the powers with which Congress has clothed the Commission. For we have previously held that there is nothing in the Act which either prevents or prejudices the right of a newspaper, as such, to apply for and receive

mon ownership of even five television stations, though permitted by the challenged rule, might be undue concentration of control; while in other circumstances, common ownership of a greater number might be compatible with the public interest. But whether so or not must be determined on an *ad hoc* basis, after consideration of all factors relevant in the determination of whether the grant of a license would be within the comprehensive concept which the Act calls "the public interest, convenience, or necessity." Cf. *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 89 U. S. App. D. C. 13 189 F. (2d) 677 (1951), as to the broad scope of the concept. The selection of a certain number, such as five or seven, as a maximum beyond which no multiple owner will be permitted to go regardless of what he may be able to show in his own behalf, is not only inconsistent with but is contrary to the mandatory provisions of § 309(b) of the Act and, with respect to the applicants described in the rule would in effect repeal or nullify that important section.

The Commission argues that the challenged rules[3]

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a license to operate a radio broadcast station. Tri-State Broadcasting Co. v. Federal Communications Comm., 68 App. D. C. 292, 96 F. 2d 564. Further consideration confirms that view."

[3] Although only § 3.636 of the Commission's Rules, concerning multiple ownership of television stations, is directly involved here, the parties have treated the case as though all three sections of the multiple ownership rules were under direct attack. As the challenged portion of § 3.636 appears *verbatim* in the other two sections, it would of course be held invalid should occasion arise to consider it on the complaints of multiple owners of AM and FM stations.

carry out its established policy of encouraging as many qualified persons as possible to seek broadcast licenses, as the public interest requires maximum diversification of program and service viewpoints; and that they also carry out the general policy of favoring competition which Congress wrote into the Communications Act. The multiple ownership rules are, the Commission says, "therefore a formulation of *Commission* policy in the licensing of stations, which is based in part upon enunciated Congressional policy applicable to radio broadcasting." We are not here concerned with the Commission's *policy* in passing upon applications. We are concerned with what purports to be a binding rule.

However laudable its policies may be, we have seen that the Commission is bound by its own statute and by the requirements of due process to grant a full hearing before denying an application for an available frequency sought by a citizen for a lawful use. We hold invalid the portion of § 3.636 of the Commission's Rules which we italicized in quoting it at length earlier in this opinion, and direct that it be eliminated therefrom. This holding will not prevent the Commission from considering in each case, in accordance with its announced policy, the question whether granting an additional license to one who is already a multiple owner would place too much control in one licensee, contrary to the public interest. But the multiple owner applicant must be given a chance in a hearing to show, if he can, that still another station will not give him such con-

trol of communications media as to prejudice the interests of the public.

This proceeding, being on petition for review of the rule making order of November 25, 1953, filed under § 402(a) of the Act, does not bring before us the order of the same date which denied the application of Storer Broadcasting Company for a television station license at Miami—which order was appealable under § 402(b). But, in view of our holding here, the Commission probably will *sua sponte* set aside the order of denial and grant Storer a hearing.

Challenged rule modified and case remanded.

Filed FEBRUARY 24, 1955

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,065 January Term, 1955.

STORER BROADCASTING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petition for Review of Order of the Federal Communications Commission.

Before: Wilbur K. Miller, Prettyman, and Bazelon, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is hereby ordered and adjudged by this Court that the order of the Federal Communications Commission adopted November 25, 1953, so far as it amends Section 3.636 of its Rules and Regulations by including therein the following language:

> 'The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest,

convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations."

be, and the same is hereby, determined to be invalid, and that this case be, and it is hereby, remanded to the Federal Communications Commission with directions to eliminate the foregoing language from Section 3.636 of its Rules and Regulations.

Dated: February 24, 1955.
Per Circuit Judge Wilbur K. Miller.
Filed: FEBRUARY 24, 1955

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 94

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

STORER BROADCASTING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

It was urged in the petition for a writ of certiorari that the decision below should be reviewed by this Court because it imposes a drastic limitation upon the rule making powers of the Federal Communications Commission which is inconsistent with decisions of this Court. Respondent's brief in opposition seeks to avoid this issue by denying that the court of appeals' decision has the general impact upon the Commission's rule making authority which its language clearly gives it (Br. 6–9). Respondent argues at considerable length that the decision below was correct for a reason neither reached nor discussed by the lower court, i. e., that the multiple ownership rules allegedly

do not implement the policy upon which the Commission rested them (Br. 10–15) [1] and, upon the basis of this analysis of the case, suggests that the invalidation of the rules cannot raise an important question because the decision below was correct (Br. 15–17). Any decision as to the legality of these rules, which have been in existence for many years and have provided a framework for the ownership and control of broadcast stations in the United States, is obviously important. Furthermore, the legal issue of the interaction of Section 309 (b) of the Communications Act with those sections of the Act conferring rule making authority upon the Commission, which was decided below, is an important question in the future administration of the Communications Act.

There has been no decision prior to the instant case which holds that Section 309 (b) precludes the adoption of a general rule effectively governing the disposition of individual applications.

[1] As part of its argument on this point, respondent erroneously treats the rules as equating the acquisition of an additional station beyond the maximum permitted by the rules with a violation of the antitrust laws, and then contends that a violation of the antitrust laws cannot be found without analysis of those factors which have previously been held relevant to such a determination (Br. 11–12). But the Commission's rules do not purport to adjudicate a violation of antitrust law. They are, instead, an enunciation of Commission policy based in part upon the same general policy considerations of fostering competition and avoidance of monopoly power which underly the antitrust statutes.

Ordinarily, a number of factors may be relevant to the question of whether the grant of a particular application is in the public interest. Every rule which selects one factor as being sufficiently important to warrant a denial, no matter how satisfactory the applicant may be in other respects, has the effect of limiting the scope of inquiry at a hearing to the question of compliance with that rule.[2] But this effect has never been held to be a deprivation of the right to be heard afforded by Section 309 (b).

As pointed out in the petition for certiorari (pp. 16–19) there have been several cases sustaining Commission rules which require the denial of applications in conflict with them. Faced with the decision in *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24 (C. A. D. C.), in which the same court of appeals sustained the Commission's television allocation plan although the court specifically recognized that applications in conflict with the plan would be automatically dismissed, respondent says that a hearing on an application may be validly denied where the rule concerned is one "concerning allocation of fre-

[2] As stated in our petition (page 16), a hearing would have to be held in any case where there is a question of whether the application concerned violates the rule. In the case of an applicant such as respondent who admittedly was the sole owner of the maximum number of stations, and who applied for another station, however, it is clear that such application would violate the rule and there would be no facts to ascertain in such a hearing.

quencies" (Br. 7).[3] But respondent gives no explanation of why Section 309 (b) precludes adoption of the multiple ownership rules and yet permits adoption of a rule which denies a hearing to an applicant for a television channel in a city to which the channel has not been assigned by the general rule.

Again, respondent concedes that a hearing need not be given a person who would operate the station in a manner violative of the Communications Act or other Federal statute (Br. 7–8). *Felman* v. *United States,* unreported, Civil No. 49 C 227, N. D. Illinois, affirmed, 339 U. S. 973, is cited as an example. But the Commission's rules there sustained,[4] which prohibited any future contracts in which the assignor of a station reserved the right to use future time on the station as part of the contract of sale, were based not on a finding of violation of law but on Commission policy derived from basic principles of the Communications Act. See Report and Order adopting the rules, 14 F. R. 179, Vol. 1, Part 3, Pike & Fischer, Radio Regulation, page 91:121.

Even in the case where the Commission's rules require denial of an application because of the broadcast of illegal lotteries, there is nothing in the Communications Act which requires the Com-

[3] The assignment of television channels to particular communities is contained in a table of assignments which is Section 3.606 of the Commission's Rules and Regulations, 47 CFR 3.606.

[4] Sections 3.109, 3.241, 3.659, 47 CFR 3.109, 3.241, and 3.659.

mission to deny a license to one who broadcasts a lottery. This Court sustained the Commission's power to make the rules, *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U. S. 284, 289–290 (Res. Br. 8), not because anything in the Communications Act absolutely requires the Commission to deny a license to one who broadcasts a lottery, but because the Commission had not abused its discretion in adopting the policy that the broadcast of lotteries is sufficiently serious to warrant denial. It is not the statute, but rather the Commission's policy determination, that prohibits a grant as being contrary to the public interest. The same is true in the present case.

It is of course true that the subject matter of the multiple ownership rules differs from that of the rules previously sustained as valid. What respondent has failed to demonstrate is that the differences have any relevance to the meaning of the hearing requirement in Section 309 (b). In its effort to support the holding of the court below, and to draw a line between what the Commission may and may not do by rule making, respondent has created *ad hoc* rules of law which draw the line merely by placing all previous decisions on one side and the instant case on the other. No reason for the arbitrary location of this line is given. However, even if it be assumed that the multiple ownership rules present a question not directly covered by the clear line of

authorities sustaining other Commission rules, the question presented obviously warrants review by this Court.

The decision of the court below is the first one which finds that Section 309 (b) limits the Commission's rule making powers. It has recently been followed by a decision of the same court holding, solely on the authority of its decision herein, that a rule regulating transmitter equipment could not be enforced without a hearing where a waiver was requested. *City of New York Municipal Broadcasting System v. Federal Communications Commission,* No. 12465, decided May 5, 1955.[5] It is significant that the view of the court below on the scope of its ruling herein, expressed in that decision, is not referred to by respondent. There is no doubt that the holding below will have a serious effect upon the administration of the Communications Act. It runs directly counter to an unbroken series of decisions by this Court and lower courts, and should be reviewed by this Court.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

WARREN E. BAKER,
General Counsel,
Federal Communications
Commission.

JULY 1955.

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[5] The decision, as yet unreported, is attached hereto as an appendix.

APPENDIX

United States Court of Appeals for the District of Columbia Circuit

No. 12465

CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Appeal From Orders of the Federal Communications Commission

Decided May 5, 1955

Before EDGERTON, WILBUR K. MILLER and BAZELON, Circuit Judges.

BAZELON, *Circuit Judge:* Appellant owns Radio Station WNYC which is duly licensed by the Federal Communications Commission to operate (1) a transmitter at a power of one kilowatt for regular broadcast purposes as a Class II station, and (2) a transmitter at a power of five kilowatts in civil defense emergencies under the so-called CONELRAD project.[1] This appeal relates to an application filed for authority to install a single transmitter, having a rated power of both five

[1] This project's purpose is to broadcast civil defense information during enemy air attacks while simultaneously minimizing the use of the radio signal as a navigational aid to the enemy.

kilowatts and one kilowatt (5/1). Such a transmitter could be used, at different times, for standard broadcast as well as CONELRAD operations by merely throwing a switch.

Appellant's application included a request that the Commission waive any conflict with § 3.41 of its rules which prohibits a Class II broadcast station such as WNYC, with maximum authorized power of 1000 watts, from installing a transmitter with a maximum rated power of more than one kilowatt.[2] Section 1.701 of the Commission's rules provides that "Any provision of the rules may be waived by the Commission, if good cause therefor exists."[3]

Without hearing or argument, the Commission denied the request for waiver and dismissed the application. Its order recited, *inter alia*, that the CONELRAD project "contemplates utilization of existing broadcast facilities, and does not contemplate major broadcast station changes in order to fit them into the plan of operation * * * [and] That a compelling need for the waiver requested has not been shown." A petition for rehearing was also denied. This petition included a request for either oral argument or a hearing "to determine whether or not * * * good cause exists" or "the public interest, convenience, and necessity would be served" by a grant of the application and request for waiver.

---

[2] 47 C. F. R. § 3.41 (Cum. Supp.). Under § 1.361 (c), 47 C. F. R. § 1.361 (c) (Rev. 1953), applications in conflict with a rule will not be considered defective if they are accompanied by a request of the applicant for waiver of the rule.

[3] 47 C. F. R. § 1.701 (Rev. 1953).

Section 308 of the Communications Act of 1934, as amended,[4] provides for the filing of the application involved here. Consideration of the application, therefore, is governed by the procedural requirements of § 309 (b).[5] Under this section, if the Commission cannot find that a grant of an application would serve the public interest, "it *shall* forthwith notify the applicant * * * of the grounds and reasons for its inability to make such finding" and "the applicant *shall* be given an opportunity to reply."[6] If the Commission is still unable to make the necessary finding, "it shall formally designate the application for hearing." Here the Commission failed to follow the required statutory procedure. Hence its order denying appellant's application for a single transmitter must be set aside and the case remanded to the Commission.

We think our recent decision in *Storer Broadcasting Co.* v. *Federal Communications Comm'n*[7] answers the Commission's contention that § 309 was properly disregarded because the application conflicted with § 3.41 of its rules. The "exceptions to the apparently unqualified generality of § 309 (b)"[8] which we described in *Storer* were of a limited nature. Clearly the conflict with § 3.41 presented by appellant is not of the character encompassed in those exceptions. We hold, therefore, that where, as here, an application accom-

[4] 66 Stat. 714, 47 U. S. C. § 308 (1952).

[5] 66 Stat. 715, 47 U. S. C. § 309 (b) (1952).

[6] Emphasis supplied.

[7] — U. S. App. D. C. —, — F. 2d — (No. 12065, decided Feb. 24, 1955).

[8] — U. S. App. D. C. at —; — F. 2d at — (slip opinion, p. 6).

panied by a request for waiver of § 3.41 is supported by reasons which are neither frivolous nor unlawful on their face,[9] the Commission is bound to observe the requirements of § 309 (b).

Upon remand, the Commission should either grant the application or follow the procedure outlined in § 309 (b). In light of this disposition, we withhold comment on questions raised concerning the merits of the application.

The orders of the Commission are vacated and set aside and the case remanded to the Commission for futher proceedings not inconsistent with this opinion.

---

[9] Appellant's application could not fairly be characterized as frivolous in view of previous authorizations to use power of one kilowatt for regular operations as a Class II station and five kilowatts for CONELRAD operations. Moreover, while not explicitly so stated, it was readily apparent that the reason for requesting permission to install a single transmitter was to avoid the greater cost which would be entailed by the installation of two transmitters, thereby saving the public funds of the City of New York.

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No. 94

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

STORER BROADCASTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 46–52) has not yet been reported. The Report and Order of the Federal Communications Commission adopting the rules in issue (R. 16–27) and the rules (R. 27–29) appear at 18 F. R. 7796.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1955 (R. 52). The petition for a writ of certiorari was filed on May 23,

1955, and was granted on October 10, 1955 (R. 53). The jurisdiction of this Court rests on 5 U. S. C. 1040 and 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether Section 309 (b) of the Communications Act of 1934, which requires a hearing before the denial of an application for a radio station license, prevents the Federal Communications Commission from adopting general regulations fixing limitations on the multiple ownership of radio facilities.

STATUTES AND REGULATION INVOLVED

The pertinent sections of the Communications Act of 1934, as amended, 48 Stat. 1064, 50 Stat. 191, 66 Stat. 715, 47 U. S. C. 151 *et seq.*, are as follows:

> Section 4 (i):
>
> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions. [47 U. S. C. 154 (i)]
>
> Section 303:
>
> Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> * * * * *
>
> (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations

and to carry out the provisions of this Act: * * *

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, * * *. [47 U. S. C. 303]

Section 309 (b):

If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. * * * [47 U. S. C. 309 (b)]

The pertinent portion of Regulation Section 3.636 *Multiple Ownership* provides:

> (a) No license for a television broadcast station shall be granted to any party (including all parties under common control*) if
>
> *The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.
>
> * * * * *
>
> (2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or director to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five tele-

vision broadcast stations.** [47 C. F. R. 3.636]

**In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors who directly or indirectly own 1% or more of the outstanding voting stock.[1]

STATEMENT

This action was brought by respondent Storer Broadcasting Company ("Storer") against the United States and the Federal Communications Commission to set aside the Report and Order of the Commission, dated November 25, 1953, and amended rules adopted thereby (R. 33–38).[2] These rules place a ceiling upon the number of radio and television broadcast stations in which any one person may have an interest. They apply, respectively, to standard broadcast (AM) radio stations, frequency modulation (FM) radio

[1] The corresponding rules dealing with multiple ownership of standard broadcast (AM) stations and FM broadcast stations are contained in Sections 3.35 and 3.240. (47 C. F. R. 3.35, 3.240; R. 27–29) They are the same as the television station rule except that the maximum limit was fixed at seven.

All three rules contain separate provisions against the ownership of more than one station serving substantially the same area. This provision was not challenged in the present case.

[2] The action was instituted in the United States Court of Appeals for the District of Columbia Circuit on January 22, 1954, by the filing of a petition for review under Section 402 (a) of the Communications Act of 1934, 47 U. S. C. 402 (a), Section 4 of the Act of December 29, 1950, 64 Stat. 1129, 1130, 5 U. S. C. 1034, and Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009.

stations, and television (TV) broadcast stations, and declare in substance that no person may have an interest in more than seven AM stations, seven FM stations, and five TV stations.

The proceeding which led to the promulgation of the challenged rules was instituted by a Notice of Proposed Rule Making (R. 13–16; 13 F. R. 5060), which set forth the text of proposed amendments to the then-existing multiple ownership rules of the Commission[3] and provided for the filing of comments by interested persons. Written comments were submitted by Storer[4]

[3] The Commission has had multiple ownership rules since 1940. The first such rule (see 5 F. R. 2382) pertained only to FM stations (then called high-frequency stations) and provided (1) that no person should own or control more than one station serving substantially the same area, and (2) that no person should own or control more than one station except upon a showing that competition would be fostered or a distinct service rendered and that no undue concentration of control would result. This rule further provided that ownership or control of more than six stations would be considered a concentration of control inconsistent with the public interest.

In 1941 a substantially similar rule was adopted for TV stations, except that the maximum number of stations was set at three (see 6 F. R. 2282, 2284–2285). In 1944, the maximum was raised to five (9 F. R. 5442).

A multiple ownership rule for AM stations, adopted in 1943, contained only a restriction relating to ownership or control of more than one station serving the same area (see 8 F. R. 16065). This restriction corresponded to the provision previously adopted for FM stations.

[4] Storer's position in the rule-making proceeding was that "the proposed amendments should not be adopted in the form

(then known as The Fort Industry Company) and eleven other parties. Each of these parties subsequently participated in oral argument held before the Commission *en banc*. No challenge has been made as to the regularity of the rule-making proceedings.

In its report, the Commission declared (R. 21) that the "fundamental purpose * * * of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest." The Commission stated further that "[i]t is our view that the operation of broadcast stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees." (*ibid.*). The report also sets forth the Commissions reasons for rejecting various alternative proposals (which would have given effect to additional considerations such as size, class, and geographical location of stations) (R. 22–23); the reason that the rules do not undertake to draw a distinction between controlling and non-controlling interests (R. 23); and the considerations

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set forth" (R. 8), and that the "public interest, convenience and necessity would be served best if the proposed amendments permitted the ownership of the same number of FM stations and Television stations as standard broadcast stations" (R. 9). See, also, R. 11–12.

favoring the specific maximum limitations adopted (R. 25–26).

At the time the rules were adopted, Storer (or its wholly owned subsidiaries) had seven AM stations, five FM stations, and five TV stations.[5] It also had on file with the Commission a pending application for a sixth TV station. This application was dismissed by the Commission without hearing because of conflict with the Commission's rules.[6] Storer thereupon filed its suit seeking review of those rules.[7]

---

[5] It had *AM stations* at Atlanta, Georgia; Birmingham, Alabama; Detroit, Michigan; Miami, Florida; San Antonio, Texas; Toledo, Ohio; and Wheeling, West Virginia; *FM stations* at Atlanta, Georgia; Detroit, Michigan; Miami, Florida; Toledo, Ohio; and Wheeling, West Virginia; *TV stations* at Atlanta, Georgia; Birmingham, Alabama; Detroit, Michigan; San Antonio, Texas; and Toledo, Ohio.

[6] A subsequent amendment to the rules, isued on September 17, 1954 (19 F. R. 6099), after the filing of Storer's petition to review, permitted a licensee to have a total of seven TV stations, provided that at least two of these stations were in the ultra high frequency (UHF) band. Its purpose was to encourage UHF television. This amendment did not enable Storer to revive its dismissed application, since that application was for a very high frequency (VHF) station and Storer already had five VHF licenses. It did, we note parenthetically, enable Storer to acquire two additional UHF stations, one in Portland, Oregon, and the other in Miami, Florida, the site of its dismissed VHF application. In this brief we shall treat the case (as did the court below) on the basis of the rules as they stood when the report of November 25, 1953, was issued.

[7] Storer did not file an appeal from the dismissal of its application.

The court of appeals declared invalid the provision of Section 3.636 (*supra*, pp. 4–5), which states that the Commission will in any event consider that there would be a concentration of control contrary to the public interest for any person to have an interest in more than five television stations.[8] The court's decision was rested solely on the ground that Section 309 (b) of the Communications Act (*supra*, p. 3) requires a hearing before an application for a license may be denied and that the effect of the rule would be to cut off that right. Having decided that Section 309 (b) precluded the adoption of a binding rule establishing criteria which an applicant must meet, the court did not reach questions tendered by Storer as to the reasonableness of the particular rule adopted.

SUMMARY OF ARGUMENT

I

The court of appeals set aside the Commission's multiple ownership rules because it concluded that the requirements of Section 309 (b) of the Communications Act (providing in substance that an application for a broadcasting license shall not be denied without hearing) preclude a binding

[8] The opinion and judgment below is directed specifically to Section 3.636. However, as the court below pointed out, the invalidation of the television rule necessarily has the effect of invalidating the similar limitations on multiple ownership contained in the rules applicable to AM stations and FM stations.

regulation that no person shall be granted more than a stated number of licenses. If this interpretation of Section 309 (b) is correct, then, logically, there is no room for exercise of the expansive rule-making powers conferred by Sections 4 (i) and 303 of the Act. Otherwise stated, the Commission is precluded from exercising that power which this and other courts have repeatedly sustained, notably in upholding the Commission's Chain Broadcasting Regulations in *National Broadcasting Co.* v. *United States,* 319 U. S. 190: the power to give greater concreteness to the standard of the "public interest" by promulgating appropriate general regulations, and to deny applications which fail to conform to such regulations.

There is no basic inconsistency between the quasi-legislative power of an administrative agency to establish general criteria, embodied in rules and regulations, which it will apply in licensing proceedings, and its adjudicatory function of passing upon individual license applications, considering them on the basis of the general standards laid down in the statute and the regulations. The right to a hearing accords the right to show that one is able to meet the standards lawfully adopted. There is no such right when it is undisputed that the applicant cannot meet those standards. In this case the respondent does not seek a hearing to show that its application meets the requirements of the Commission's regu-

lations. Its purpose, rather, is to have the regulation declared invalid or inapplicable to it.

The court of appeals stopped short of holding that the Commission can never adopt a rule which, as applied to particular circumstances, may bar particular applicants. Thus, it indicated that it would recognize a rule which excludes from consideration applicants who have been guilty of unlawful conduct. But, as the *National Broadcasting* case, *supra*, emphasizes, the Commission's power to particularize the "public interest" standard is not confined to a power to declare simply that an applicant's participation in some designated species of illegal or criminal conduct will preclude a grant. The power extends generally to the establishment of criteria for the exercise of the licensing power committed by Congress to the Commission, subject, of course, to the condition that the particular exercise of the rule-making function be consistent with the standards and objectives of the Communications Act.

The fact that this Court's decision in *National Broadcasting*, upholding the closely analogous Chain Broadcasting Regulations, may be deemed to rest in part upon the Court's observation that the application of the regulations would not be inflexible affords no basis for distinguishing the instant case. No more than the Chain Broadcasting Regulations are the multiple ownership rules fixed "for all time" (*National Broadcasting*, p. 225). They are subject to repeal or amend-

ment (having in fact been modified during the pendency of these proceedings) and, in an appropriate case, the Commission, of course, has power to waive them.

II

The policy of the Communications Act is one of free competition. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 474. Congress was gravely concerned that, absent an assertion of governmental control, "the public interest might be subordinated to monopolistic domination in the broadcasting field." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137. Competition in the presentation of viewpoints, no less than competition in the economic sense, is vital, for "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public * * *." *Associated Press* v. *United States*, 326 U. S. 1, 20. The Commission's multiple ownership rules undertake to implement this competitive philosophy which lies at the root of the Act. Their purpose, the Commission stated (R. 21), is "to maximize diversification of program and service viewpoints" and "to prevent any undue concentration of economic power."

Plainly, the rules are appropriate to these ends. There are only a limited number of broadcasting channels available and many, rather than few,

voices can be heard only if licenses are widely distributed. Moreover, since the formation of public opinion is important on the national, as well as on the local, level, effective diversification cannot be achieved merely by assuring that there will be some competition in each region. To permit the growth of large chains, however the component stations might happen to be distributed, would be to invite a creeping trend to uniformity.

The rules also serve the related purpose of safeguarding against undue concentrations of economic power in the hands of particular broadcasters. Since the owner of numerous stations is apt to possess substantial bargaining advantages over smaller competitors, it is important, if the independents are to flourish, that they receive protection against encroachment by large and powerful chains.

Respondent's suggestion that the Commission is treating it as an antitrust violator, but without proof of violation, rests upon a misconception. The Commission does not purport to enforce the antitrust laws, though the multiple ownership rules are, indeed, in keeping with the underlying philosophy of those laws. The Commission's object in promulgating the instant rules, as in the case of the Chain Broadcasting Regulations, is to assure "the larger and more effective use of radio" (*National Broadcasting, supra,* p. 216).

They do this by forestalling undue concentration and by insisting upon a reasonably widespread distribution of channels to diverse parties.

The rules before the court (which are actually amendments of prior rules) are the product of an accumulated agency experience of many years, both in dealing with the problem of multiple ownership on an *ad hoc* basis (the approach followed in relation to AM stations until 1953) and by rule-making (the approach adopted at an early date in relation to FM and TV). They rest upon informed judgment and upon intimate working knowledge of the pattern and development of the industry. The type of empiric judgment which the Commission has made is peculiarly within its province and must stand in the absence of a plain showing of arbitrariness. In fact, there is nothing to suggest that the line which the Commission has drawn is not an eminently reasonable one.

Respondent urges that an applicant must be allowed to show affirmative factors in his favor which might be weighed in the scales against considerations resting on multiple ownership. But this is in essence an argument, untenable in the face of the authorities, that the Commission may have only "policies" and not rules. The rules here reflect the judgment that preservation of full opportunity for competition and for the presentation of diverse viewpoints is, *in and of itself*, of sufficiently great importance to warrant the pre-

vention of inordinately large holdings of broadcasting channels, and that there are enough different persons in the United States capable and desirous of serving the needs of the public so that extremes of multiple ownership may be avoided without adversely affecting the public interest in securing qualified licensees. There is nothing in this record to impugn the wisdom of that judgment and certainly nothing to show that it was arbitrary.

ARGUMENT

Introduction

The court of appeals set aside the limitations on station ownership in the Commission's multiple ownership rules because it was of the view that such rules, "however laudable" their purpose, conflict with Section 309 (b) of the Communications Act, which requires a hearing whenever the Commission cannot determine upon examination that the grant of an application would serve the public interest. A purely literal reading of Section 309 (b), without consideration of the other provisions of the Act, leads to the conclusion that the Commission is estopped from prescribing, by binding rule, the general standards which it will employ in licensing proceedings. Aware, however, that there have been numerous decisions, including decisions of this Court, upholding this rule-making power, the court below stated that there were exceptions to the contrary doctrine which it was declaring. It said that an application for

license might be denied pursuant to rule and without a hearing if, but only if, (1) the applicant was an alien, (2) the license was sought for an unlawful use or purpose, or (3) a particular frequency was sought at a location to which that frequency had not been assigned in consequence of the Commission's adoption of an allocation plan.[9] Since the multiple ownership rules do not fall within any of these categories, they were held to be invalid.

We shall argue under Point I that the court of appeals misinterpreted the decisions which sustain the Commission's exercise of the rule-making power; that these decisions are not reconcilable with the result reached below; and that the rule-making power extends generally to the establishment of criteria for the exercise of the licensing function committed by Congress to the Commission, subject, of course, to the condition that the particular exercise of the rule-making function be consistent with the standards and objectives of the Communications Act.

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[9] The court below reiterated its view that Section 309 (b) limits the Commission's genral rule-making power to the foregoing situations in *City of New York Municipal Broadcasting System* v. *Federal Communications Commission*, 223 F. 2d 637 (C. A. D. C.). There the court held, solely on the authority of its *Storer* decision, that the Commission could not deny an application to make changes in transmission equipment, although the changes would violate a technical rule on the subject, without granting a hearing on whether waiver of the rule would be in the public interest.

We shall urge under Point II that the rules in question are addressed to objects which have been entrusted to the protection of the Commission, that they are appropriate to the achievement of their declared purposes, and that they are reasonable.

I. The Commission may establish, by appropriate rule, the standards which it will apply in passing on applications for broadcasting licenses

Section 301 of the Communications Act provides that no person shall use any apparatus for the transmission of energy by radio[10] in interstate or foreign commerce except pursuant to a license granted by the Commission. The Commission's power and duty with respect to licensing are treated in some detail in the Act. Section 308 (a) provides that the Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application. The application is required to set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant. Sections 308 (b), 319 (a). The application may be granted only if the public interest, convenience and necessity would be served

[10] Section 3 (b) of the Act includes television within the definition of "radio communication". Radio communication is the "transmission by radio of writing, signs, signals, pictures, and sounds of all kinds * * *."

thereby. Sections 307 (a), 309 (a), 319 (c). Plainly, the licensing function is not a mere ministerial task, but requires the Commission to make administrative judgments as to whether proposed operations will be in the public interest, and whether applicants have the appropriate qualifications to serve that interest. Cf. *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 215–216.

The Commission's rule-making authority is specifically set forth in two sections of the Act. Section 4 (i) provides:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Section 303 provides:

> Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> * * * * *
>
> (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: * * *
>
> * * * * *
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *.

The court of appeals held that this general rule-making power of the Commission could not be exercised to limit the right of applicants to a hearing under Section 309 (b) because "any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected" (R. 50). It concluded, therefore, that the multiple ownership rules, insofar as they require the threshold denial of inconsistent applications, are invalid, "however laudable" the object of those rules might be (R. 52). This holding cannot be reconciled with decisions of this and other courts upholding the Commission's power to promulgate general rules enunciating the policy which it will apply in determining whether a particular application meets the statutory standard of the public interest. *National Broadcasting Co.* v. *United States,* 319 U. S. 190; *Federal Communications Commission* v. *American Broadcasting Co.,* 347 U. S. 284; *Logansport Broadcasting Corp.* v. *United States,* 210 F. 2d 24 (C. A. D. C.); *Felman* v. *United States,* N. D. Ill., March 13, 1950 (not reported), affirmed *per curiam,* 339 U. S. 973. In each of these cases the challenged rule, like the multiple ownership rule here involved, set forth certain conditions under which the Commission would refuse to grant a license as contrary to the public interest.

The *National Broadcasting* case, *supra* (to which the court of appeals did not refer), is

completely inconsistent with the holding below that a hearing is, in all cases, necessary "before denying an application for an available frequency sought by a citizen for a lawful use" (R. 52). This Court there upheld the Commission's Chain Broadcasting Regulations as a valid exercise of the Commission's rule-making powers. Those regulations require that "[n]o license shall be granted" to licensees or applicants having certain specified relationships with networks—relationships not unlawful in themselves, but found by the Commission to be detrimental to the public interest."[11] The Court reviewed in detail the purposes of the Communications Act and the Commission's statutory powers, and it sustained the Commission's authority to make rules of a non-technical and non-engineering nature establishing standards of the public interest which it would follow in issuing licenses.

The Chain Broadcasting Regulations were vigorously challenged in the statutory three-judge district court and in this Court on the express ground that the Commission could not deal with the problem by general rule, but was required to consider each application upon an *ad hoc* basis. This argument was rejected. In the district

[11] The proscribed practices included exclusive affiliation agreements with networks, unduly long affiliation contracts, burdensome restrictions on the stations' right to reject network programs, control by networks of station rates, etc. *National Broadcasting*, 319 U. S. at 198–209.

court, Judge Learned Hand stated (*National Broadcasting Co.* v. *United States*, 47 F. Supp. 940, 945 (S. D. N. Y.):

> Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future.

This Court's opinion is no less decisive. It pointed out (p. 218) that the Chain Broadcasting Regulations "represent a particularization of the Commission's conception of the 'public interest' sought to be safeguarded by Congress in enacting the Communications Act of 1934". The Court emphasized (p. 219) that the regulatory powers which Congress gave the Commission were "not niggardly but expansive," and concluded (p. 224) that the Communications Act "authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting."

It is clear, therefore, that *National Broadcasting* cannot be squared with the decision below. The Chain Broadcasting Regulations were not restricted to the proscription of unlawful practices and do not come within any of the exceptional categories formulated by the court of appeals. And the stated consequence of a failure of compliance with the rules (as in the case of the

multiple ownership rules here involved) is denial of a license.

Respondent argues (Br. in Opp., pp. 8–9) that the Chain Broadcasting Regulations were upheld because in applying them the Commission would still consider in each case whether grant of a proposed application would be in the public interest. In support of this position, it quotes the statement in the *National Broadcasting* case that "[i]n each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.'" (319 U. S. at 225). This language means simply that in each case the Commission must exercise an "ultimate judgment," not that it must hold a hearing regardless of the nature of the issues raised by the application. As this Court had previously pointed out in holding the regulations reviewable (*Columbia Broadcasting System* v. *United States*, 316 U. S. 407), they are not mere "announcements of policy" (p. 422), but are "rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the ground specified in the regulations without more" (p. 418).[12] This statement, and the further statement in *National*

[12] The Court also pointed out (p. 420) that the operation of the regulations "is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations".

Broadcasting (which directly follows the sentence quoted by respondent) that "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations" (p. 225), indicate that the "flexibility" of the Chain Broadcasting Regulations, to which the Court referred in the *National Broadcasting* case, arose from the fact that the Commission could always change them through amendment or repeal. Similarly, in the instant case, the Commission may amend the multiple ownership rules as the public interest requires,[13] or waive them for good cause. Sections 1.701, 1.702, Commission's General Rules and Regulations, 47 CFR 1.701, 1.702.

It is to be noted that, in the instant case, respondent is in no position to suggest that there are special or extraordinary factors which might have warranted an exception from the rule. When its application was dismissed as falling under the ban of the rule, it did not seek reconsideration or raise in any other way a contention that the rule should be waived in the particular circumstances. Moreover, respondent has not chosen to appeal from the denial of its application. Its proceeding is one to enjoin the promul-

[13] Indeed, as pointed out *supra* (note 6, p. 8) the Commission has modified the rules during the course of this litigation.

gation of the rules. It thus stands or falls on the proposition that the Commission had no power to adopt the rules in issue.

The *Felman* case, *supra*, is another instance in which Commission rules of the type here under review have been upheld. The rules there in question provided that no license will be granted or renewed where, as consideration for the transfer or assignment of a station, the transferor reserves a right to reassignment of the license or the right to use the facilities of the assigned station. 47 CFR 3.109, 3.241, 3.659. There again, as in the case of the rules here in issue, the Commission prescribed conditions under which an application for a lawful use of an available frequency would be dismissed without hearing. The three-judge district court upheld the Commission's exercise of its rule-making powers and this Court affirmed *per curiam*.[14]

In *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U. S. 284, this

[14] The motion to affirm the district court's judgment in *Felman*, which this Court granted, stated the Government's position as follows (No. 814, Oct. Term, 1949, Motion to Affirm, pp. 5–6):

"The import of the Federal Communications Act is that the licensee of a radio station shall be fully amenable to public regulation of his station for the purpose of assuring operation of the station in the public interest. The Commission may therefore adopt regulations against grant or renewal of a broadcasting license if the licensee has assumed an obligation to a third person encroaching upon his ability best to serve those whom his broadcasts reach."

Court upheld the Commission's authority to adopt rules providing that an application for license or renewal of license would not be granted where the applicant followed a policy of broadcasting lotteries in violation of Section 1304 of the Criminal Code.[15] The Court pointed out (pp. 289–290, note 7) that the statutory standard of public interest was sufficiently broad to permit the Commission to consider an applicant's violations of a criminal statute, and it ruled (p. 290) that "if this consideration is a proper one in individual cases, there is no reason why it may not be stated in advance by the Commission in interpretative regulations defining the prohibited conduct with greater clarity." "Indeed," the Court stated (p. 289), the Commission would be "remiss in its duties if it failed, in the exercise of its licensing authority, to aid in implementing the statute, either *by general rule* or by individual decisions" (emphasis added). The court below attempted to distinguish the lottery rules from the multiple ownership rules on the ground that the former were written in terms of denying licenses to persons involved in an illegal course of conduct. But this, as the court of appeals itself recognized, is not a distinction made by Section 309 (b).

[15] Although the Court sustained the Commission's power to promulgate the regulations, it held that portions of the rules were invalid because the so-called "give-away" programs which the Commission condemned as lotteries were not in fact lotteries within the meaning of 18 U. S. C. 1304.

Logansport Broadcasting Corp. v. *United States*, 210 F. 2d 24 (C. A. D. C.), points up even more clearly the fallacy of the court of appeals' restrictive interpretation of the Commission's rule-making powers. For the rules there sustained, providing for a nationwide allocation of television frequencies and for automatic dismissal, without hearing, of applications not conforming to the plan, clearly are no less inconsistent with the court's all-embracing view of the hearing requirements of Section 309 (b) than are the multiple ownership rules.[16] The court apparently felt that removing a frequency from availability by rule was appropriate, in spite of Section 309 (b), where it was done in order to make it available for some other community but not where the objective was to keep it available for some other applicant not already a multiple licensee. But there is nothing in the broad statutory delegations of rule-making powers to the Commission which furnishes any foundation for the view that these powers extend to the former situation but not to the latter.

The only rational explanation of the cases is that the Commission can particularize by rule the standards which it will apply in passing on individual license applications, and that it is not

[16] Indeed, in the *Logansport* case, *supra*, it was argued that the provisions of Section 307 (b) of the Communications Act, imposed an additional, special requirement that allocations of frequencies among communities be done on a case-by-case basis rather than by general rule. See 210 F. 2d at 26–27.

required by Section 309 (b) to reopen, on a case-to-case basis, the policy judgments which the rules embody. Those decisions establish that the rule-making power is not limited to prohibiting conduct specifically condemned by the Act, and that the Commission may adopt enforcible rules to implement all policies which are fairly comprehended by the statutory concept of the "public interest." To require the Commission to consider in each case whether the grant of a particular application, which does not comply with a rule, might nevertheless be in the public interest (as the court of appeals would have it do), would turn binding rules into no more than "policy" announcements settling nothing. Such a result would defeat the basic purpose of rule-making in the licensing field, namely, to permit the Commission to "state * * * in advance" factors which will result in denial of applications. *American Broadcasting,* supra, p. 290.

This interpretation of the Communications Act does not do violence to Section 309 (b) but gives effect and scope to those sections of the Act which confer broad rule-making authority upon the Commission. There is no basic opposition between the Commission's quasi-legislative powers, which enable it to establish appropriate criteria for application in individual licensing proceedings, and the adjudicatory function of passing upon individual applications. To be sure, Section 309 (b) guarantees an applicant the opportunity

to show, at a hearing, that he is able to meet the standards set forth in the Act and in the Commission's rules lawfully adopted thereunder. Here, however, there is no such question. It appears, on the face of it, that the applicant cannot satisfy the specified standards. In such circumstances, there is no occasion or necessity for an adjudicatory proceeding.

II. The challenged multiple ownership rules constitute an appropriate and reasonable exercise of the Commission's rule-making power

Congress, as observed above, did not attempt "an itemized catalogue" (*National Broadcasting, supra,* p. 219) of the subjects with which the Commission might deal by rule or regulation. Instead, it defined "broad areas for regulation" (*id.* 220) and adopted, as the "touchstone" of the Commission's regulatory power, the standard of "public interest, convenience, or necessity" (*id.* 216), a standard which "leaves wide discretion and calls for imaginative interpretation." *Federal Communications Commission* v. *RCA Communications, Inc.,* 346 U. S. 86, 90.

An important aspect of the "public interest" to be served by the Commission is the maintenance of the field of broadcasting as one of free and extensive competition. See *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U. S. 470, 474. As this Court has observed, the Act was adopted "under the spur of

a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137. Thus, Section 313 provides that a court may, upon finding any licensee guilty of a violation of the antitrust laws, revoke its license in addition to imposing other sanctions. Section 311 directs the Commission to refuse a license to any person who has suffered a revocation under Section 313.[17] Although these sections deal specifically with the extreme case of one who has been judicially determined to be a violator of the antitrust laws, they serve to emphasize that the Commission, in determining whether grants will best serve the public interest, owes a high duty to implement the underlying philosophy which motivates and informs the antitrust laws: the philosophy which puts its faith in multiple centers of activity and in free competition among them. It needs no argument or demonstration that, in a democratic society, this principle assumes a very special importance in the area of mass communications. *Associated Press* v. *United States*, 326 U. S. 1, 20. Cf. *Mansfield*

[17] Congress also forbade persons engaged in radio communications from engaging in communications by wire, and vice versa, if the purpose or effect thereof "may be" substantially to lessen competition, to restrain commerce, or unlawfully to create a monopoly (Section 314).

Journal Co. v. Federal Communications Commission, 180 F. 2d 28, 33 (C. A. D. C.), holding that conduct which falls short of violation of the Sherman Act may nonetheless run counter to the policies of diversification and competition which Congress aimed to foster through the Communications Act.[18]

The numerical proscriptions in the multiple ownership rules were intended, the Commission stated in its report (R. 21), "to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcasting system on a free competitive basis." By providing for diversification of station ownership through limiting the number of stations in which any one person may have an interest, the rules implement that policy in two ways: (1) they "maximize diversification of program and service viewpoints," and (2) they "prevent any undue concentration of economic power" (*ibid.*). In the Commission's view, "operation of broadcasting stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees," since the "vitality of our system of broadcasting depends in large part on the introduction into this field of licensees

[18] In the *Mansfield Journal* case, the court held that the Commission had properly considered the applicant's anti-competitve practices in the conduct of its newspaper business in determining not to grant it a license for a radio station.

who are prepared and qualified to serve the varied and divergent needs of the public for radio service" (*ibid.*).

The multiple ownership rules are a reasonable means of effectuating the policy of diversification.[19] Concentration of station ownership in the hands of a relatively small number of licensees would, like the network abuses which the Chain Broadcasting Regulations were designed to eliminate, " 'prevent the maximum utilization of radio facilities in the public interest' " (*National Broadcasting, supra,* p. 224). There are only a limited number of broadcasting channels available for licensing, and station owners may wield enormous influence in the guidance and formation of public opinion. Certainly it is not unreasonable for the Commission to conclude that the public interest requires that broadcasting stations be allocated so as to insure that a wide diversity of viewpoints will be heard. As this Court stated in *Associated Press* v. *United States,* 326 U. S. 1, 20, "[t]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public * * *."[20]

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[19] As noted above (note 4, pp. 6–7), in commenting to the Commission on the proposed rules, Storer (then known as Fort Industry Company) did not question the propriety of the Commission's imposing some limitations upon multiple ownership; it urged only that the same limitation should be adopted for AM, FM and TV (R. 8–9, 11–12).

[20] Limiting absentee ownership and control of stations also furthers the public interest in obtaining programming by

Since public opinion on major issues is formed and exists on a nationwide basis, effective diversification of viewpoints cannot be achieved, as respondent suggests (Brief in Opp., p. 14), merely in relation to local service areas. If, for example, one person were to acquire broadcasting facilities in a large number of cities, there would be grave cause to fear a tendency to uniformity in the presentation of viewpoint on the national level, even though in each particular city involved there would still be other communication facilities. In any realistic sense, the fullest public presentation of all shades of opinion can be adequately protected only if the problem is dealt with on a national scale.

In its administration of the Communications Act, the Commission has, in a variety of contexts, "consistently adhered" (R. 21) to this important principle of diversification. Thus, in selecting among competing applicants for a station, the Commission has favored applicants lacking interests (or significant interests) in other stations,[21] or, absent such a choice, persons whose other stations have service areas which do not overlap

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local stations which is responsive to the needs of the community.

[21] *Plains Radio Broadcasting Co.* v. *Federal Communications Commission*, 175 F. 2d 359 (C. A. D. C.); *Bamberger Broadcasting Service, Inc.*, 11 F. C. C. 211, 222; *Albert S. and Robert A. Drohlich*, 11 F. C. C. 700, 705; *Associated Broadcasters, Inc.*, 12 F. C. C. 688, 699–700; *Southern Tier Radio Service*, 11 F. C. C. 171, 182–3; *Aladdin Radio and Television, Inc.*, 9 Pike & Fischer, Radio Regulation 1, 40.

(or significantly overlap) the service area of the channel sought.[22] In recognition of the fact that grant of a license to a non-newspaper applicant will result in greater diversity among the mass communications media, the Commission has preferred applicants without newspaper connections. *Plains Radio Broadcasting, supra,* p. 363; *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 189 F. 2d 677 (C. A. D. C.), certiorari denied, 342 U. S. 830. Since at least 1940 (see *Courier-Journal & Louisville Times Co.,* 5 Pike & Fischer, Radio Regulation 348), the Commission rules have prohibited granting to one person two stations of the same type (AM or FM radio, or TV) which serve substantially the same area.[23] And, as observed *supra* (note 3, p. 6), the Commission has had some form of multiple ownership rules since 1940.

The multiple ownership rules also serve the related purpose of effectuating the congressional

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[22] *Meadville Tribune Broadcasting Co.,* 11 F. C. C. 666, 670; *Zinn and Golliday et al.,* 11 F. C. C. 419, 425; *Norman Broadcasting Co.,* 5 Pike & Fischer, Radio Regulation 120, 142; *Central Broadcasting Co.,* 11 F. C. C. 1310, 1317, affirmed *sub nom. Plains Radio Broadcasting Co.* v. *Federal Communications Commission,* 175 F. 2d 359 (C. A. D. C.).

[23] This provision is a part of the multiple ownership rules involved, but has not been challenged by respondent. Similar but even more far-reaching restrictions have been imposed upon the licensing of stations to networks, where the effect may be to restrain competition. See discussion of Chain Broadcasting Regulations in *National Broadcasting, supra,* pp. 206–208.

policy against undue concentration of economic power in the hands of individual members of the broadcasting industry. The owner of numerous stations is in a position to utilize the enhanced bargaining power conferred by multiple ownership to gain substantial economic advantage over weaker competitors with respect to network affiliations, advertising, programming, service, etc.—an advantage which flows not from rendering a better service to the public but from the concentration of economic power. It was not unreasonable for the Commission to conclude that the "'public interest' * * * of the listening public in 'the larger and more effective use of radio'" (*National Broadcasting, supra,* p. 216) required it to protect independent broadcasters from encroachment by large and powerful chains.

Since the purposes of the multiple ownership rules are to promote diversification and to forestall undue concentration of economic power in the hands of individual members of the broadcasting industry, the Commission is not required to approach the problem, as respondent argues (Brief in Opp., pp. 10, 13), as if it were deciding in each case whether the acquisition of one additional station would constitute a provable violation of the antitrust laws. For, as the Commission's report makes clear (R. 21-22), the multiple ownership rules do not purport to enforce the antitrust laws as such. They seek to carry out the broader, and prophylactic, policy

of preventing the emergence of a pattern of "monopolistic domination in the broadcasting field" (*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137). Cf. *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28, 33 (C. A. D. C.). In the *National Broadcasting* case, *supra*, the regulations were not rested on a conclusion that the various practices to which they pertained could be regarded as *per se* violations of the anti-trust laws (p. 224). The practices in question were proscribed not because they were found unlawful, but because they were deemed to "'prevent the maximum utilization of radio facilities in the public interest'" (*ibid.*). The *National Broadcasting* case makes clear, we submit, that the Commission, in the exercise of its rule-making power, may determine that a trend toward heavy concentration is antithetical to the maximum utilization of radio facilities and contrary to the public interest.

If this be so, the Commission may set a limit or ceiling to ward off the dangers reasonably apprehended.[24] The limitations established do not become invalid because another group of experts

[24] We note in passing that the situations are myriad in which the standard established by a statute or rule is fixed in terms of numerical limitations. Consider, for example, minimum-wage and maximum-hour provisions (*United States* v. *Darby*, 312 U. S. 100), provisions establishing maximum weights for trucks using state highways (*Morris* v. *Duby*, 274 U. S. 135), and provisions placing limitations

might have drawn the line lower or higher. They are not vulnerable because A, the owner of nineteen broadcasting licenses (seven AM, seven FM and five TV), appears to have less influence and power over public opinion than B, owner of a similar number of stations, and because the potential injury to the public in making a twentieth grant to A may be less immediately apparent than in the case of such a grant to B. The essence of the legislative or rule-making function is the prescription of a general standard applicable to all members of a class. See *North American Co.* v. *Securities and Exchange Commission*, 327 U. S. 686, 710–711; *Assigned Car Cases*, 274 U. S. 564, 583.

The Commission, of course, might have attempted to deal with the problem on a case-to-case basis.[25] It had followed that approach, so far as AM service was concerned, until the 1953 amendment of its rules. It was in the light of its experience with an *ad hoc* approach, as compared to its fourteen years of experience with multiple ownership rules as applied first to FM and later to TV, that the Commission decided that the

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upon the number of liquor licenses which will be issued (*Decie* v. *Brown*, 167 Mass. 290; *Cox* v. *Timm*, 182 Ind. 7).

[25] "[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 203; *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 421.

fairer and more efficient procedure was by rule-making.[26] The development of a quasi-legislative standard through the piecemeal process of case-by-case adjudication suffers from the fact that in individual cases there are ordinarily a very limited number of participants and a variety of issues. By utilizing the rule-making procedure, the Commission was able to afford all interested parties an opportunity to participate and present their views on a single question of basic policy affecting both the public at large and individual licensees or prospective licensees.

Respondent's view, adopted by the court below, that the multiple ownership question is not an appropriate subject of rule-making rests fundamentally on the assumption that an individual applicant might be able to show some affirmative factor, such as high quality of proposed program service, which might be weighed in the scales against the disadvantages of concentration.[27] The

[26] The Commission's Report and Order states (R. 19): "Our determination here that the problems presented by the multiple ownership of broadcast stations are best resolved by the promulgation of rules of general applicability is made on the basis of the knowledge and experience acquired by this Commission over a period of more than a decade in the handling of these problems."

[27] The court of appeals stated (R. 51) that the question whether ownership of more than five television stations would be compatible with the public interest "must be determined on an *ad hoc* basis, after consideration of all factors relevant in the determination of whether the grant of a license would be within the comprehensive concept which the

appeals itself, sustaining other Commission rules which operate in precisely the same way as do the multiple ownership rules. We also showed that the multiple ownership rules are a reasonable implementation of valid policies well within the Commission's cognizance. This reply brief will be directed to respondent's interpretation of Section 309 (b), which differs from that of the court below; to its contention that the rules are, for various reasons, arbitrary and capricious; and to its argument that there was a failure of compliance with the Administrative Procedure Act.

I. The Rules Do Not Contravene Section 309(b).

The court of appeals held that Section 309(b) means "that any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected" (R. 50). In our opening brief, we have shown that this interpretation of the statute is erroneous. Respondent has not attempted to support the rationale of the court of appeals. Instead, it has now taken the position[1] that Section 309(b) requires a hearing on an application whenever Congress itself has not "so defined the public interest as to preclude the grant" (Br. 14).

[1] Respondent contended before the court of appeals that the Commission's authority to adopt binding rules was limited to those matters as to which Congress had specifically itemized the power to make rules and regulations (Br. to Ct. App. 11).

This new position has apparently been devised by respondent to meet the needs of its case and to explain away the instances in which the Commission's authority to adopt rules governing the execution of its licensing functions has been sustained. Respondent has cited no relevant authority for its view.[2] It obviously cannot be derived from Section 309 itself. And while respondent states that its position makes "consistent" the "carefully reticulated licensing and rule making scheme" of the Act (Br. 14), it is clear that it does so only by preventing any meaningful utilization of the Commission's rule-making authority. For there is no need for a substantive rule by the agency where Congress has already specifically forbidden a grant.

It appears that under either the court of appeals' formulation of the problem, or respondent's revision thereof, the Commission would have no

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[2] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327, and *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (Resp. Br. 14), are both irrelevant to the question of the scope of the rule-making power. The *Ashbacker* case held that where two applications were mutually exclusive, and only one could be granted, it was error to grant one without a hearing and to direct a later hearing which would put the other applicant in the position of a newcomer attempting to displace an existing licensee. The *Sanders* case held that a party likely to be financially injured by a grant was a party aggrieved who had standing to appeal under Section 402(b) of the Act, 47 U.S.C. 402(b).

In fact, this Court suggested in *Ashbacker* that the Commission might have adopted a rule requiring an application for a frequency, previously applied for, to be filed within a certain date to be eligible for a hearing. 326 U.S. at 333. Such a rule has been adopted. Section 1.724, 47 C.F.R. 1.724.

binding rule-making authority, even in those situations where Congress has expressly itemized the Commission's rule-making powers.[3] This is sharply illustrated by the recent case of *City of New York Municipal Broadcasting System* v. *Federal Communications Commission*, 223 F. 2d 637 (C.A. D.C.), in which the court of appeals, resting solely on the authority of its decision in the instant case, held that a hearing must be afforded an applicant wishing to install a transmitter in its station with power greater than the maximum permitted under Commission rule. Notwithstanding the fact that specific authority for adopting that type of rule is granted by Section 303 of the Communications Act, respondent suggests that a hearing was properly held to be required in the *City of New York* case because "Congress has not itself defined the public interest in respect of a single transmitter having multiple power ratings" (Br. 16, fn.). Thus, respondent's interpretation of the hearing provision (Section 309(b)) means ultimately that the Commission can have no effective rules even in areas where Congress has provided, by detailed specification, for the exercise of rule-making powers.[4]

It is clear, furthermore, that the Commission rules already sustained by the courts cannot be

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[3] It seems well settled, however, that an agency with the broad rule-making powers afforded the Commission (see Sections 4(i) and 303(f), (r) of the Act) is not limited in the adoption of rules to the specific matters itemized in its statute. *American Trucking Assns.* v. *United States*, 344 U.S. 298.

[4] Another illustration may serve to emphasize the practical consequences which would follow from this position. Section

distinguished as respondent suggests. The Chain Broadcasting Regulations, governing the relationship between independent stations and networks with respect to such matters as option time and exclusivity of affiliation, are not mere repetitions of a specific Congressional definition of the public interest. On the contrary, they represent, like the multiple ownership rules here in issue, "a particularization of the Commission's conception of the 'public interest' sought to be safeguarded by Congress." *National Broadcasting Co. v. United States*, 319 U.S. 190, 218.

This Court held in *Columbia Broadcasting System v. United States*, 316 U.S. 407, 420, that the Chain Broadcasting Regulations were reviewable because

> Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations.[5]

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303 expressly authorizes the Commission to adopt rules specifying the nature of the service to be performed by various classes of stations (303(b)) and rules assigning bands of frequencies to the stations of each class (303(c)). Such rules have been adopted. But under respondent's theory the Commission would nonetheless seem required to provide a full evidentiary hearing to an applicant for a police radio station wishing to operate in bands set aside under the applicable rule for television broadcasting.

[5] The similarity of the Chain Broadcasting Regulations to the multiple ownership rules is discussed fully in our opening brief, pp. 20-23.

Respondent argues (Br. 18) that those rules, which it admits cannot be distinguished under its formula from the multiple ownership rules, nevertheless contemplated a hearing in each case. In this connection, it rests heavily upon a quotation from the Government's brief in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, to the effect that an applicant would have the opportunity to show that the policies underlying the rules were not appropriate to his situation. But the fact is that the then existing rules, to which the quoted portion of the Government's brief referred, provided only that an application failing to conform to Commission rules would be considered defective unless accompanied by a petition to amend the rule or by a request for a waiver setting forth the reasons in support thereof. Sections 1.72, 1.81, 6 F.R. 2656.[6] There was no provision for a

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[6] Section 1.72 provided in pertinent part:

(c) Applications which are not in accordance with the Commission's rules, regulations or other requirements will be considered defective unless accompanied either (1) by a petition in accordance with Section 1.81 to amend any rule or regulation with which the application is in conflict, or (2) by a request of the applicant for waiver of, or an exception to, any rule, regulation or requirement with which the application is in conflict. Such request shall show the nature of the waiver or exception desired and set forth the reasons in support thereof.

Section 1.81 provided:

Requests for amendment of rules.—Any person may petition for amendment of any rule or regulation. Such petition shall show the desired change in the rules and regulations and set forth the reasons in support thereof.

hearing in each case upon such a request.[7] As we pointed out in our opening brief, page 23, a waiver may also be requested with respect to the Commission's multiple ownership rules. This does not mean, of course, that the mere filing of an application for a waiver (actually, none was filed here[8]) would necessarily require the holding of a hearing, for if that were the case a rule would no longer be a rule. It means only that it might be an abuse of discretion to fail to hear a request for a waiver which showed, on its face, the existence of circumstances making application of the rule inappropriate.

Another case in which the facts do not fit respondent's formulation is *Felman* v. *United States* (N.D. Ill.), March 13, 1950 (not reported), affirmed, *per curiam*, 339 U.S. 973 (see opening brief, p. 24). The Commission rules upheld by

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[7] As pointed out in our opening brief (pp. 27-28), a hearing would be afforded if there were a question of compliance with a rule. That was the purpose of the hearing ordered in *Thomas S. Lee Enterprises, Inc.*, 5 Pike & Fischer, Radio Regulation 1179 (Resp. Br. 19). The Commission there found that the applicant had induced violations of the Chain Broadcasting Regulations, and specifically refused to reconsider the policy bases of the rules, declaring that such arguments should be directed to a request to amend the rules (p. 1200). It granted a renewal of the licenses involved solely because of the severity of the penalty involved and to give the applicant an opportunity for a final chance to achieve compliance (p. 1200).

In the case of an applicant, such as respondent, who already was the sole owner of the maximum number of stations, however, there would be no factual question to resolve at an evidentiary hearing.

[8] See opening brief, p. 23.

that decision[9] prohibited any future contracts in which the assignor of a station, as part of the contract of sale, reserved the right to use future time on the station. Existing contracts, previously approved by the Commission, were permitted to continue for a period of fifteen years provided they were modified to meet certain fixed conditions. The rules thus constituted a modification of previous Commission policy in applying the general statutory standards of public interest and licensee responsibility. They cannot be characterized, as respondent has attempted to do (Br. 14), as a mere codification into rule of the necessary licensing effect of Section 301 of the Act.[10] Cf. *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. 2d 244 (C.A.D.C.). And respondent's view of the rules establishing a television allocation plan assigning channels to communities throughout the United States, sustained in *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24 (C.A. D.C.), is similarly unsound. For the determination of the Commission that the general statutory

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[9] Sections 3.139, 3.241, 3.659. The rule applicable to standard broadcast (AM) stations, Section 3.139, was recently changed in number only from 3.109, the number given it in our opening brief. See 20 F.R. 9041, 9059.

[10] Nor, of course, are the Commission's lottery rules, sustained in part in *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, the result of any declaration by Congress that a license may not be granted to one who broadcasts lotteries. They are the result of the Commission's policy determination that the violation of 18 U.S.C. 1304, a statute prohibiting the broadcast of lotteries by licensed stations is sufficiently serious under the statutory public interest standard to warrant rejection of an applicant otherwise fully qualified.

standard of Section 307(b) requiring a "fair, efficient, and equitable distribution of radio service" could best be achieved in the new television field through the adoption of a fixed allocation plan, and that applications inconsistent with this plan would "not be accepted for filing," Rule Section 3.607, 47 C.F.R. 3.607, was not a necessary consequence of the Act. On the contrary, in the standard broadcast (AM) field the Commission has always permitted any applicant to apply for a channel at any location.[11]

Respondent also seeks comfort from a proposed amendment to the Communications Act which was one of several proposals (none of which was adopted) designed to deal with the question of treatment of newspaper applicants for broadcasting frequencies.[12] The burden of these proposals, as the committee reports indicate, was that the Commission should not deem a newspaper applicant for a frequency *per se* disqualified. The Commission had never in fact refused to consider a newspaper applicant merely because of its news-

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[11] The reference to the "Davis Amendment," 45 Stat. 373, in respondent's brief does not help respondent's argument. For that amendment, which did represent a Congressional effort to fix by law the manner of distributing broadcast stations, was repealed in 1936, 49 Stat. 1475 (after the section was inserted in the Communications Act as 307(b), 48 Stat. 1084), for the express reason that such decision might be better left to the Commission. See H. Rep. No. 2589, 74th Cong., 2d Sess., p. 3; S. Rep. No. 1588, 74th Cong., 2d Sess., p. 2.

[12] See S. Rep. No. 741, 81st Cong., 1st Sess., on S. 1973, pp. 2-3; H. Rep. No. 1750, 82d Cong., 2d Sess., on S. 658, p. 9; H. Rep. No. 2426, 82d Cong., 2d Sess., on S. 658, p. 18.

paper interests and, as respondent points out (Br. 20-21), the proposal to which it refers was dropped in committee. It is difficult to see the relevance of this to respondent's case. The inference that Congress was concerned lest there be discrimination against newspaper applicants scarcely supports the view that Congress believes that the Commission should not have rules which limit the number of frequencies which may be awarded to any one person.

The fact is that Congress has long been mindful of the existence of multiple ownership rules [13] and has never intimated disapproval. At one point, indeed, there was a proposal to fix a statutory ceiling upon ownership of broadcasting facilities by any one person. See S. 1333, 80th Cong., 1st Sess. The Chairman of the Commission opposed this provision in the bill on the grounds that it was unwise to adopt a single standard for the various classes of broadcast service and that, in the interest of flexibility, the power to fix appropriate standards should be left with the Commission. Hearings before Subcommitte of Senate Committee on Interstate and Foreign Commerce on S. 1333, 80th Cong., 1st Sess., pp. 61-65. S. 1333, as subsequently reported out by the committee, omitted this provision. See S. Rep. No. 1567, 80th Cong., 2d Sess.

In summary, respondent's position creates an unnecessary conflict between the rule-making func-

[13] See Hearings before the Senate Committee on Interstate and Foreign Commerce on S. 814, 78th Cong., 1st Sess., pp. 716-717.

tion and Section 309(b). Respondent would resolve that conflict by destroying the rule-making power. We submit that the only principle to be derived from established precedents is that where the Commission has adopted a reasonable rule properly related to considerations of the public interest, the requirements of Section 309(b) are met by a hearing, where appropriate, on the question of compliance with the rule.

H. The Rules Are Reasonable

The court below did not hold that the multiple ownership rules were not reasonably related to considerations which the Commission may take into account in determining whether applications should be granted as meeting the statutory standard of the public interest.[14] In our opening brief (pp. 28-42),

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[14] The court of appeals stated (R. 51-52):

> The Commission argues that the challenged rules carry out its established policy of encouraging as many qualified persons as possible to seek broadcast licenses, as the public interest requires maximum diversification of program and service viewpoints; and that they also carry out the general policy of favoring competition which Congress wrote into the Communications Act. The multiple ownership rules are, the Commission says, "therefore a formulation of *Commission* policy in the licensing of stations, which is based in part upon enunciated Congressional policy applicable to radio broadcasting." We are not here concerned with the Commission's *policy* in passing upon applications. We are concerned with what purports to be a binding rule.
>
> However laudable its policies may be, we have seen that the Commission is bound by its own statute and by the requirements of due process to grant a full hearing before denying an application for an available frequency sought by a citizen for a lawful use. * * *

we nonetheless pointed out that the rules are reasonable and that they are calculated to implement policies which the Commission is authorized and, indeed, obligated to pursue.

The Commission's Report succinctly states the basic policy considerations underlying the rules:

> * * * Simply stated, the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest. [R. 21.]

The Commission's concern, in short, was with two aspects of the basic problem of preserving a full measure of competition in the broadcasting field: competition in the economic sense, and competition in the presentation of programs and viewpoints.[15] Diversification of ownership interests is the only practicable means of safeguarding these objectives.

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[15] As early as in its Report on Chain Broadcasting (Docket No. 5060, May 1941), p. 72, in discussing the problem of National Broadcasting Company's ownership of two networks, the Commission emphasized the importance of avoiding a concentration of power in too few hands. It stated, "Our determination that it is not in the public interest for a station to enter into a regular affiliation contract with a network organization maintaining more than one network does not, however, rest merely upon competitive considerations. We are seriously concerned also with the maintenance of a free radio system from the point of view of concentration of power over licensees and their listeners." The Report also referred to the general problem of multiple ownership, although the investigation had dealt primarily with network operations. (Report on Chain Broadcasting, 1941, pp. 2, 99.)

As the Commission's Report makes amply clear, the Commission was not dealing with questions of violation of the antitrust laws. That is not its function. The Commission's obligation is to promote "the larger and more effective use of radio," *National Broadcasting, supra*, p. 216. In this effort, the Commission has drawn, and properly so, upon the competitive philosophy which underlies and informs the antitrust laws.

Respondent concedes that the Commission may consider practices falling short of illegality (Br. 23), and that it may consider diversification of program and service viewpoints (Br. 27). Despite this concession, it proceeds to urge that the rules cannot properly be related to the Commission's announced objectives because they are not based upon findings covering those matters which would have to be considered in order to find an antitrust violation. It relies (Br. 24) upon *United States* v. *Columbia Steel Co.*, 334 U.S. 495, and *Transamerica Corp.* v. *Board of Governors of Federal Reserve System*, 206 F. 2d 163 (C.A. 3).[16] But since those cases applied the standard of illegality under the antitrust laws, they have no application

[16] In the *Transamerica* case, while the court found no violation of law, it stated, "We agree that this quantitative analysis discloses a tremendous concentration of banking capital, and thereby of economic power, in the hands of the Transamerica group which may be unwise and against sound public policy. It may well be in the public interest to curb the growth of this banking colossus by appropriate legislative or administrative action. This, however, is not for us to decide." 206 F. 2d at 169.

here. As emphasized in our opening brief (pp. 34-35), the Commission has the duty to provide for the fullest use of radio in the public interest through a licensing policy reflecting the concept of competition. *National Broadcasting Co.* v. *United States, supra*; *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28 (C.A.D.C.). The significance of *National Broadcasting* and *Mansfield Journal* lies not in the particular practices involved, but in their recognition that the Act's policy in favor of competition and diversification is a touchstone of the public interest.[17]

It follows that the Commission need not, and should not, wait until the undesirable effects of undue concentration manifest themselves in extreme form. Certainly, there is nothing arbitrary in a farsighted recognition that such concentration represents a potential threat to the continued economic vigor of the "independents" and that the

[17] Respondent's suggestion that since the allocation plan permits a theoretical total of 1850 commercial television stations, and one station constitutes only .00054 of the total, the rules are therefore arbitrary (Br. 25), is plainly misleading. In the first place, the number of operating television stations is under 500. See 21st Annual Report of the Federal Communications Commission, p. 94. In the second place, respondent's stations now can render service to well over 7,000,000 persons, counting only those persons within the standard metropolitan areas of the cities in which it has stations. (1950 Census.) Miami, the city for which respondent had its application dismissed by the Commission, has a population within its metropolitan area of 495,000 persons. Plainly, an additional station there would represent an increase in competitive strength and ability to reach large segments of the public which can hardly be characterized as the infinitesimal change respondent attempts to make it appear.

very existence of larger multiple holdings would entail a diminution in program diversification.[18]

Respondent argues (Br. 27-28) that the rules are not reasonably related to the object of diversification of program and service viewpoints because they take into account the applicant's ownership of stations in areas other than those which would be served by a grant of his pending application.[19]

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[18] The Commission's prophylactic approach to the problem of multiple ownership may be compared to that adopted by Congress in Section 8 of the Clayton Act, 38 Stat. 733, as amended, 15 U.S.C. 19. This section prohibits any one person from being a director of two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, if such corporations are competitors and the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws. In a suit arising under Section 8, where it was argued that no specific evil had resulted from the dual directorship involved, the District Court for the Southern District of New York emphasized the preventive nature of the legislation in stating: "* * * what Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates. The legislation was essentially preventative." *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 616.

[19] Respondent also claims that the rules would necessarily exclude a qualified applicant in an area not served by any existing facility, even where there was no other qualified applicant. It makes no claim, however, that this situation has ever arisen. Respondent's own application for Channel 10 in Miami, Florida, which was dismissed by the Commission because respondent already owned five television stations, was not the only application for the channel. See *Storer Broadcasting Co.*, 9 Pike & Fischer, Radio Regulation 1363. And the two additional UHF television stations acquired by respondent under the amended rule were both acquisitions by purchase of stations already authorized. In any event, if the situation posited by respondent should arise, the Commission, of course, could grant a waiver.

Adequate diversification cannot be judged, however, in terms of a purely local outlook.[20] There is a physical limit to the number of radio channels available for distribution in the United States. The entire field of broadcasting is thus necessarily confined to a limited number of licensees. In the nature of things, those granted licenses have very considerable power to decide what will and what will not be heard by the public. It is not enough to ask whether there is some diversity in the viewpoints expressed over the air in individual localities. An affirmative answer to this question would not detract from the conclusion that to grant to one person control, in many communities, of a scarce and very important outlet of expression would have pervasive effects. See opening brief, pp. 31-32.

Respondent also suggests that the multiple ownership rules have stunted the growth of FM and television broadcasting (Br. 35). This is an unfounded assertion which respondent makes no real attempt to support. It is unaccompanied by the citation of even a single instance in which a multiple owner sought to acquire a license in a city where there were no other qualified applicants and was prevented from doing so by the rules. When the Commission amended the television multiple ownership rule in 1954, to permit the acquisition of two additional UHF (ultra high frequency) television

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[20] The Commission has never limited its consideration to other stations licensed to the applicant in the same city or contiguous areas. See, *e.g.*, *Aladdin Radio and Television, Inc.*, 9 Pike & Fischer, Radio Regulation 1.

stations (19 F.R. 6099), it did so because there were special problems facing UHF stations (*e.g.*, the scarcity of television receivers capable of receiving UHF transmissions and the less efficient propagation of UHF signals) which tended to discourage entry into that field.[21] But recognition of these difficulties demonstrates only that the rules are sufficiently flexible to permit change in appropriate circumstances. It provides no support for the contention that multiple ownership rules fail to serve the public interest.

III. The Commission Complied with the Administrative Procedure Act

Respondent's final point is devoted to the contention that the Commission's Report, promulgating the rules, does not meet the requirements of the Administrative Procedure Act.[22] Respondent appears to recognize, at the outset, that Section 4(b) of the Administrative Procedure Act, 5 U.S.C. 1003(b), which requires the agency to "incorporate in any rules adopted a concise general statement of their basis and purpose," is the controlling provision here (Br. 32). But it promptly ignores this and proceeds to cite cases involving agency deci-

[21] For a discussion of the problems facing UHF stations, see "Television Network Regulation And The UHF Problem," a memorandum prepared for the Senate Committee on Interstate and Foreign Commerce by Harry M. Plotkin, special counsel, 84th Cong., 1st Sess., pp. 1-6. The comments on multiple ownership of stations (pp. 39-40) are of particular interest.

[22] The Petition for Review filed below contained no such allegation of error (R. 36-37).

argument proves too much, for it is one which might be advanced against almost any type of rule. The Commission's judgment here was that preservation of full opportunity for competition and for the presentation of diverse viewpoints is, *in and of itself*, of sufficiently great public importance to warrant the prevention of inordinately large holdings of broadcasting channels, even assuming that a multiple owner who seeks to exceed the established maxima is well qualified, in every other respect, to serve the public.[28] The Commission's experience and the record of the industry furnish a convincing basis for the agency's conclusion that there are enough different persons in the United States capable and desirous of serving the needs of the public so that extremes of multiple ownership may be avoided without adversely affecting the public interest in securing qualified licensees. There is nothing, we submit, to suggest the contrary.

Should future experience or changed conditions demonstrate the propriety of modifications in the rules, the Commission, of course, is em-

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Act calls 'the public interest, convenience, or necessity,' " and that the Commission has no power to decide "*in vacuo* that there can never be an instance in which public interest, convenience and necessity would be served by granting an additional license to one who is already licensed for five television stations" (R. 50).

[28] A single important factor may similarly warrant a denial in an adjudicatory proceeding, though the applicant is well qualified in all other respects. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223.

powered to make them; it did so during the pendency of these proceedings in authorizing a maximum of seven TV stations, provided that two of them are in the UHF part of the radio spectrum (note 6, p. 8, *supra*). And if exceptional circumstances suggest, in a particular case, that a waiver or exception is appropriate, the Commission has power to grant it.[29]

If, as we have urged, the Commission may impose *some* limitation on multiple ownership of broadcasting stations, it seems plain that the selection of a particular ceiling is a matter for the Commission's informed and expert judgment. Certainly, "where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific existence" is no less applicable to an administrative rule than to a statute. *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 186. Respondent's burden in challenging the rule is to show that "the Commission had no reasonable ground for the exercise of [its] judgment." *American Trucking Assns.* v. *United States,* 344 U. S. 298, 314.

This burden cannot be sustained. The Commission's report shows that the particular

[29] As noted above (pp. 23–24), respondent here can raise no issue as to whether it should have been accorded exceptional treatment. It did not seek a waiver and it has failed to appeal the Commission's action in dismissing its application. Its challenge is directed simply and solely to the rule-making power.

numerical limitations selected were preeminently reasonable and far from stringent or arbitrary. The limitation of five TV stations was the same as the rules had previously contained. The Commission concluded that this limitation should be retained because it found, "based on extensive experience with the problems of multiple ownership," that the limitation had "proven practicable and desirable" (R. 25). The number of FM broadcasting stations was fixed at seven (one more than the notice of proposed rule-making had provided), so that the limitation would be the same for AM and FM stations (R. 26). The limitation on AM stations, which was the only new substantive provision in the rules, was fixed at seven, although the Commission noted that a greater number of stations can be accommodated in the FM band and that a more stringent limitation on AM might have been justified. It decided, however, to permit seven AM stations "in order that present holdings of such stations be not unduly disrupted" (*ibid.*). The Commission also noted that limiting AM holdings to seven was consistent with the historical development of AM broadcasting, a field in which "only a very few parties" had any interests in more than seven stations (*ibid.*). The Commission cannot be said to have been unreasonable in concluding that someone who owns a total of nineteen broadcasting stations should not be permitted to increase his power in the field any further.[30] We

stress again that this "essentially empiric" judgment was of the kind entrusted by Congress to the "permanent expert body" charged "with the duty of being responsive to the dynamic character of [broadcasting] problems." *Board of Trade* v. *United States*, 314 U. S. 534, 546.

The Commission rejected, after careful consideration, alternative proposals which would have given weight, for purposes of fixing the maxima, to such factors as class and size of stations, geographical location and population served. It did so because it concluded, "as a result of study of the present holdings of multiple owners," that the inclusion of these factors would result in a rule which would be "either unsatisfactory or unworkable" (R. 22–23). Such a rule, it was

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[30] The rules provide that, in computing the number of stations in which a person has an interest, holdings of less than 1% of the stock of corporations with more than 50 stockholders may be disregarded (R. 28). Although Storer attacked this provision in the court of appeals as unreasonable (R. 37, 47), it does not affect Storer, since the latter's radio and television holdings are all 100% interests (see p. 8, *supra*). Storer, therefore, has no standing to challenge this provision. *Heald* v. *District of Columbia*, 259 U. S. 114; *Queensboro Farm Products* v. *Wickard*, 137 F. 2d 969, 977 (C. A. 2).

In any event, we submit that the provision is not unreasonable. It does not, as Storer stated below (R. 37), treat the ownership of 1% of the stock of a station "as equivalent to ownership, operation or control" thereof. The multiple ownership rules are not framed in terms of "control" of a station but in terms of having an interest therein. The 1% provision merely recognizes that certain interests may properly be treated as *de minimis*.

found, would necessitate either substantial divestment of present holdings by existing licensees or an extreme upward revision of the total number of stations to be permitted.[31] The course chosen by the Commission avoids dislocation of the industry and continues in effect (with some changes) a set of governing criteria which reasonably secures the vital public interest in competition and diversification.

The multiple ownership rules do not take anything away from Storer. They do not require it to make changes in its business practices.[32] They *do* interpose a bar to its acquisition of additional stations, since it already has the maximum number in all categories. But the acquisition of such stations through Government grant is a privilege, not a right, and the Government may properly limit the number of channels granted to a single person so as to promote the "larger and more effective use of radio." The limitations here imposed are plainly appropriate to that end.

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[31] If, for example, one person were already the licensee of five stations in a single area, a limitation, expressed in terms of no-more-than-"X"-per-area would compel divestiture unless "X" were fixed at five or higher. But allowing a licensee five-per-area would permit inordinately large aggregations on a nationwide scale.

[32] Compare the extensive changes in methods of doing business required by the Chain Broadcasting Regulations and by the Interstate Commerce Commission's leasing rules upheld in *American Trucking Assns.* v. *United States*, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed, and the Commission's order amending the multiple ownership rules should be affirmed.

Respectfully submitted.

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No. 94

United States of America, Ante Perovic, Cuka,
Petitioners,

v.

Federal Communications Commission

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Reply Brief for Petitioners

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 94

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

STORER BROADCASTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

The authority of the Federal Communications Commission to adopt general regulations which set standards related to the "public interest" and to deny applications which fail to meet these standards is not a matter of first impression in this Court. In our opening brief, we discussed the decisions which sustain this power. We pointed out that the decision below was inconsistent with decisions of this Court, and, indeed, of the court of

sions in adjudicatory proceedings in an attempt to establish that the Commission erroneously failed to make findings of fact.

The Administrative Procedure Act does not require that rule-making be predicated upon a hearing and findings of fact unless the agency is required by other statute to proceed on that basis. Section 4(b); *American Trucking Assns* v. *United States*, 344 U.S. 298, 318-320. There is no such statutory requirement applicable here.[23]

So far as Section 4(b) is concerned, it is abundantly plain that the Commission's report more than satisfies the requirement that there be a general statement of the basis and purpose of the rules.

[23] The only instances of such a requirement in the Communications Act are that changes in frequency or authorized power of a station, or in the times of operation, even if accomplished by a rule change, shall not be made unless the licensee consents or after a public hearing. Communications Act, Section 303(f), 47 U.S.C. 303(f).

The Report not only discusses the policy considerations underlying the rules and the statutory authority for adopting them, but also thoroughly reviews the comments submitted to the Commission and the reasons for accepting or rejecting alternative proposals. See opening brief, pages 39-42.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1954

No. [redacted] 94

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

—against—

STORER BROADCASTING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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June 1955.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Petitioners,* —*against*— STORER BROADCASTING COMPANY, *Respondent.*	No. 814

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals (App. 1a-12a) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered February 24, 1955 (App. 13a-14a). Petitioners invoke the jurisdiction of this Court under 5 U. S. C. 1040 and 28 U. S. C. 1254(1).

Questions Presented

On November 25, 1953, the Federal Communications Commission promulgated rules with respect to multiple ownership of broadcast stations licensed by the Commission.

Those rules, among other things, limit, by numerical proscription and without a hearing, the maximum number of interests that one person may have in radio and television broadcast stations. The numerical proscription provisions affecting applicants for television licenses became a part of § 3.636 of the Rules and Regulations of the Commission.

By a judgment of February 24, 1954, the Court of Appeals for the District of Columbia Circuit held that so much of § 3.636 as limited television licensees to a maximum ownership of five such stations violated the Communications Act of 1934. The review of that judgment sought by petitioners presents these questions:

1. Whether § 3.636 is valid

(a) When construed by the Commission to deny a license applicant the hearing provided by Section 309(b) of the Communications Act of 1934.

(b) When construed by the Commission to convert the question of the public interest in diversity of ownership into a conclusive presumption, numerically defined, that dispenses with proof and precludes dispute.

(c) When the Commission has stated only abstractly in the rule its basis and reasons for the establishment of the numerical limit.

2. Whether the grounds urged by the petition constitute a special or important reason why this Court should grant the petition.

Statute and Regulation Involved

The pertinent section of the Communications Act of 1934, as amended, 48 Stat. 1064, 50 Stat. 191, 66 Stat. 715, 47 U. S. C. 151, *et seq.*, is as follows:

Section 309(b):

> If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. * * * [47 U. S. C. 309(b)]

The pertinent portions of Regulation § 3.636 *Multiple ownership* provide:

> (a) No license for a television broadcast station shall be granted to any party (including all parties under common control†) if
>
> * * * * *
>
> (2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the

†The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations.†† [47 C. F. R. 3.636]

††In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1% or more of the outstanding voting stock.

Statement

This proceeding was instituted January 22, 1954, when respondent Storer Broadcasting Company (hereafter called Storer) petitioned under Section 402(a) of the Communications Act of 1934 (47 U. S. C. 402(a)) and Section 4 of the Act of December 29, 1950, 64 Stat. 1129, 1130 (5 U. S. C. 1034) to have set aside an order of the Federal Communications Commission. That order, adopted November 25, 1953, promulgated the revisions that are §§ 3.35, 3.240 and 3.636 of the Rules and Regulations of the Commission.* Those revised rules relate to the multiple owner-

*The Commission's Report and Order adopting the revised rules is at 18 F. R. 7796. It is printed in the Joint Appendix filed below and will be referred to there as "R. 20-38".

ship by licensees of the Commission of radio and television broadcast stations.

The revised rules impose numerical limitations on the number of stations that may be licensed to any party by providing that no license will be granted if such "would result in a concentration of control of . . . broadcast stations in a manner inconsistent with public interest, convenience, or necessity" and, "The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of more than" seven standard (AM) [§ 3.35], seven frequency modulation (FM) [§ 3.240] or five television (TV) [§ 3.636] broadcast stations.*

The judgment of the Court below sets aside so much of § 3.636 as conclusively presumes that there will be a concentration of control contrary to "the public interest, convenience, or necessity" for any person to have an interest in any more than five TV broadcast stations (App. 13a-14a).

The decision of the Court of Appeals is based in chief upon Section 309(b) of the Communications Act of 1934. Although conceding that the generality of Section 309(b) is not unqualified, the Court below held that the Section in-

*On November 25, 1953, Storer was the licensee in its own name of five AM stations, five FM stations and three TV stations. Wholly owned subsidiaries of Storer were the licensees of two AM stations and two TV stations.

Petitioners properly concede, therefore, that § 3.636 adversely affects Storer; in fact, they note that on the same day the Commission adopted the amended multiple ownership rules, it dismissed, without hearing, a pending application by Storer for an additional television station in Miami (Pet. 6-7). See, also, the Petition, fn. 3.

tends "that any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected" (App. 8a). The Court observed that the Commission may not freeze

> "... into a binding rule a limitation upon its consideration of the public interest in a respect in which the facts and circumstances may differ widely from case to case." (App. 9a)

Argument

I

THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT.

The Court of Appeals concluded that selection of the number "five" as the maximum figure beyond which multiple ownership of TV broadcast stations will not be permitted to go, regardless of what an applicant may be able to show in his own behalf, is contrary to the mandatory hearing provisions of Section 309(b) of the Communications Act and, with respect to the applicant, would in effect repeal or nullify that important section (App. 10a).

Section 309(b) declares that if the Commission shall be unable to find that the public interest, convenience, or necessity would be served by the granting of an application, it shall forthwith notify the applicant of the grounds and reasons for its inability to make such finding and give the applicant an opportunity to reply. If the Commission, after considering such reply is still unable to make that finding

> "... it shall formally designate the application for hearing on the grounds or reasons then obtaining."

The decision below does not, as suggested by petitioners (Pet. 9-11, 16), construe Section 309(b) either to bar promulgation by the Commission of general rules applicable to licensing proceedings or to require that its powers in that respect be limited to the matters specifically itemized in Section 303. It does hold, however, that the Commission may not by general rule preclude the hearing that Section 309(b) requires the Commission to grant to an applicant before it denies a license for a lawful use of an available facility. *Ashbacker Radio Corp.* v. *Federal Communications Comm'n*, 326 U. S. 327.

There is, therefore, no conflict of decision here with those cases in this Court or the court below that concede power in the Commission to promulgate general rules concerning allocation of frequencies, classification of stations and the like. *Radio Corp.* v. *United States*, 341 U. S. 412; *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24. Such rules relate to the definition of the facilities available for licensing, which precedes the determination of the persons to be licensed to operate such facilities under the licensing procedures specified in Sections 308, 309, 310 and 319 of the Communications Act.

Since the decision below does not construe Section 309(b) to require that the Commission hold a hearing before denying a license to one who concededly would operate a station in a manner violative of the Communications Act or any other Federal statute, it raises no conflict with *Felman* v. *United States*, 339 U. S. 973 (rules prohibiting licensing an applicant who proposes to transfer by

contract to a third person part of the licensee's responsibility for the operation of the station in violation of Section 301 of the Communications Act); or with *Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U. S. 284 (rules prohibiting licensing an applicant who proposes to broadcast lotteries in violation of Section 1304 of the United States Criminal Code). Clearly, the Commission is not required to grant a hearing to an applicant who intends to carry on activities that a statute declares are contrary to the public interest; for the statute bars the possibility of the finding, prerequisite to a grant of the license, that it would serve the public interest.

The decision below simply rules, in conformity with earlier rulings of this Court, that when the question of who should receive a license for a lawful use of an available facility is reached, the Congress has not conferred upon the Commission authority to establish rigid classifications of applicants for licenses. In those situations, only a case-by-case analysis of all relevant factors meets the requirements of the Communications Act. *National Broadcasting Co.* v. *United States*, 319 U. S. 190. Thus, although the chain broadcasting regulations sustained in the *NBC* case included a regulation prohibiting a network from owning or controlling more than one station in a given service area, this Court was careful to note that

> "In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.'" (319 U. S. at 223)*

*The decision in *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, is not to the contrary. That case held that review of the order of the Commission promulgating the chain broadcasting rules was authorized by § 402(a) of the Communications Act where

The Commission's administrative application of the chain broadcasting regulations since the *NBC* case has adhered to the requirement of this Court that the Commission "exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.'" *Thomas S. Lee Enterprises, Inc., d/b as Don Lee Broadcasting System*, 5 Pike & Fisher R. R. 1179. This practice conforms to the Commission's representations to this Court in its brief in the *NBC* case that the chain broadcasting regulations were not "iron bound" and did not "constitute an abdication by the Commission of all discretion".*

---

the bill of complaint stated a cause of action in equity. Although the Commission in that case sought to avoid judicial review of its order by claiming that the rules were akin to press releases, this Court chose to treat them as what they purported to be "—an exercise of delegated legislative power—". In so doing, however, the Court did not sanction application of the rules to particular cases without the rudiments of fair trial. Indeed, the subsequent decision in the *NBC* case made clear that the Commission must, as to each application coming before it, exercise judgment whether the grant of a license would serve the public interest.

*In its brief in the *NBC* case the Commission stated (at page 77): "Nor is there any basis for the suggestion (NBC Br. 87; CBS Br. 49) that the regulations are 'iron bound' and constitute an abdication by the Commission of all discretion. The Commission must apply the statutory standard of public interest, convenience or necessity to each application for a license in the light of the facts pertinent to the application. *Each applicant (unless his application is granted without a hearing) is entitled to a hearing not only that he may have an opportunity to show that he is entitled to a grant of an application under the established policies of the Commission, but also that he may show, if necessary, that such policies are not appropriate in his particular situation.* In fact, the Commission has adopted rules for the specific purpose of protecting the rights of such applicants in enabling them to make such a showing if they can . . . ." [Emphasis added.]

II

THE DECISION BELOW RAISES NO IMPORTANT QUESTION OF FEDERAL LAW.

Petitioners urge that this case raises an important Federal question, because § 3.636 is an implementation of agency policies against economic concentration and in favor of diversification of program and service viewpoints, and because those policies can be administered most conveniently in the Commission if they are embedded in *per se* doctrines or rules (Pet. 12-15, 20).

A. The Numerical Proscription Provisions of § 3.636 Do Not Implement Antimonopoly Policy or Diversification of Program and Service Viewpoints.

The Commission may not, of course, excuse default of its duties under Section 309(b) simply by extolling the policies upon which it claims the numerical proscription provisions of § 3.636 are based (Pet. 12-15). But setting aside that point, the fact is the numerical proscription provisions of § 3.636 do not implement the policies cited by the Commission. Numerical limitation of maximum station ownership neither forwards antimonopoly policy nor the policy favoring program and service diversification.

The Congress has never enacted any antimonopoly legislation applicable to broadcasting that differs in any respect from the law applicable to other business. Section 313 of the Communications Act, which the Commission has said the rules are intended to implement (R. 24), merely declares applicable to radio communications all

> "laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade."

It is admitted, of course, that the Commission has power to apply Section 313 by refusing licenses where the grant would result in a violation of any of the laws embraced by that section, and, indeed, it must take into account, in determining whether public interest requires the granting or withholding of a license in any given situation, competitive practices falling short of a positive violation of the antitrust laws. But, as this Court held in *Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U. S. 284, 290, the Commission's power to adopt general rules purporting to apply specific Federal laws is limited by the scope of those laws.

Viewed as a purported implementation of the policy of the antitrust laws, the numerical proscription provisions of §3.636 constitute a determination by the Commission that the acquisition by any one person of an interest in more than the specified number of TV stations has an economic effect contrary to such policy, without regard to the facts concerning the actual or potential effect of such acquisition upon competition.* But that determination is squarely in conflict with the express provisions of the antitrust laws that require analysis of economic consequences. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 528-29, 531.

Basic to a determination of the effect on competition of any proposed acquisition are such factors as the purpose of such acquisition, the existence, number, activity and strength of competitors in the market affected by the ac-

*The Commission will naturally consider the special nature of the communications industry in determining what activities or acquisitions may lessen competition [*Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U. S. 86, 98], but it cannot rewrite the antitrust laws and by administrative fiat bar an acquisition having no effect or only an insubstantial effect upon competition.

quisition, the size and location of the acquiring interest and the size and location of the interest proposed to be acquired. *United States v. Columbia Steel Co., supra,* at 527-28. The numerical proscription rules preclude consideration of any such factors.

But those factors, important from the antitrust standpoint in all fields of activity, require special consideration in the field of television broadcasting. Television stations differ substantially in such important respects as their geographical location, power, frequency, population served, hours of operation, pattern of coverage, protection from interference by other stations and additional, but like, factors. *Cf. Radio Voice of Springfield, Inc.,* 3 Pike & Fischer R. R. 2010, 2014. In § 3.636, the Commission explicitly recognizes that those factors must be considered whenever an applicant has less than the specified number of stations. Its only excuse for refusing to consider them after an applicant reaches the limit is that such a course would be "unsatisfactory or unworkable." (R. 27)

To preclude by an absolute numerical limit consideration of all those variable factors departs from long-established antitrust principles and creates an arbitrary and obviously false presumption that an ultra-high frequency TV station in Butte, Montana, is to be equated with a very-high frequency station in New York City.

Apart from such considerations, inquiry into the facts would be necessary even on the Commission's theory that for purposes of the antitrust laws all stations should be regarded as equal. The Commission's present allocation plan contemplates 1,850 commercial TV stations.* A single

*Hearings before Communications Subcommittee of Senate Committee on Interstate and Foreign Commerce on the status of UHF and on S. 3095, 83rd Cong., 2d Sess. 142, 185-87.

TV station thus represents only .00054 of the number provided by existing allocations. By § 3.636, the Commission would foreclose consideration of whether the increase in ownership from .00270 to .00324 of TV stations would, under the facts of a particular case, result in conflict with the policy of the antitrust laws. That determination obviously cannot be made *in vacuo;* it clearly involves thorough study, which § 3.636 precludes, of the facts existing at the time.

The numerical proscription provisions of § 3.636 are, therefore, not only arbitrary; they are in basic and fundamental conflict with the requirement and policy of the antitrust laws that the issue of undue concentration of economic power must be determined in the light of all relevant economic facts.* As this Court has stated in holding invalid a comparable rule:

> "... The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power." *Miller* v. *United States,* 294 U. S. 435, 440.

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*Commissioner Doerfer recently stated in connection with the action of the Commission in permitting two additional UHF TV stations to be owned by multiple owners of five VHF TV stations:

> "... I am constrained to record my misgivings about linking a numerical evaluation of stations with 'undue concentration of ownership' as an unfailing guide as to what is in the public interest.
>
> "... I have grave doubts as to the wisdom of picking a 'number' without more reliable and persuasive evidence that the number chosen will in all cases mark the upper limit of what will safeguard the public interest. ... There is not much more than intuition as the basis for the present rule." Report and Order (Docket 10822), FCC Mimeo. 10215, September 17, 1954.

Viewed as a purported implementation of the Commission's policy of program and service diversification, numerical proscription is equally invalid.

Diversification of program and service viewpoints is one of a number of entirely proper objectives of the Commission. But the numerical proscription requirement of § 3.636 bears no relation to that particular objective. Numerical proscription precludes consideration of the program and service viewpoints available in any service area; it applies to ownership of stations serving wholly different areas. By way of illustration, the maximum area served by a television station is measured by a radius of approximately 60 miles.* The fact that an applicant for a license for a television station in Miami, Florida, also has an interest in a television station in Detroit, Michigan, cannot have any conceivable relation to the question of program and service diversification in Miami, Florida.

Furthermore, the portion of § 3.636 set aside below, would, if allowed to operate, exclude an otherwise qualified applicant for a given broadcast facility in an area that is not served by any such existing facility, and that, even though there is no other qualified applicant. Similarly, numerical proscription excludes a multiple owner from areas in which there are more allocated facilities than qualified applicants and to which such owner would bring an additional viewpoint. Those results clearly are not in the public interest and exalt a formula at the expense of the public convenience.

Diversification is but one of the many factors to be considered by the Commission in determining the public

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*FCC Sixth Report and Order, Vol. 1, Part 3, Pike & Fischer R. R. 91:645-47.

interest. It includes not only radio and television, but newspapers,* magazines, theaters and similar interests, and it must, as the Commission has frequently held, yield to proof of superiority in other respects. *Aladdin Radio and Television Inc.*, 9 Pike & Fischer R. R. 1, 40. To exclude evidence with respect to all those other relevant factors simply because an applicant for a facility in one area has elsewhere acquired the maximum number permitted is to disregard the warning of this Court that an administrative agency must not place "excessive emphasis" upon a single facet of its responsibility. *Southern S. S. Co.* v. *NLRB*, 316 U. S. 31, 47.

B. The Numerical Proscription Provisions of § 3.636 Debase Performance of the Commission's Administrative Function.

It is contended that the power to make general rules is a necessary adjunct of the Commission's licensing power (Pet. 12-20). Only by general rules, petitioners suggest, can prompt disposition of license applications be had (Pet. 15). But the Communications Act requires that the Commission bring more than a flair for dispatch to its conduct of the licensing process.

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*Petitioners suggest (Pet. 14) that § 3.636 is merely an extension of an established diversification policy favoring applicants without newspaper connections in selecting among competing applicants for a license. That policy, however, unlike the numerical proscription provisions of § 3.636, has never been treated by the Commission as an absolute prohibition [see *Bamberger Broadcasting Service, Inc.*, 11 F. C. C. 211; *Midland Broadcasting Co.*, 3 Pike & Fischer R. R. 1961]; and, furthermore, it is related to diversification within the area served by the station to be licensed [*Scripps-Howard Radio, Inc.* v. *Federal Communications Comm'n*, 189 F. 2d 677, *cert. denied*, 342 U. S. 830].

Section 309(b) of the Act, as already noted, in terms of broadcast generality, confers the right to a hearing upon applicants to whom the Commission would deny a license. The remaining sections of the Communications Act relating to licensing are, for the most part, general in nature and not clear of policy elements. When commenting upon the duties of other administrative agencies under statutes in which Congress advisedly has left flexible concepts, this Court has said that such concepts are "to be defined with particularity by the myriad of cases from the field" over which the agency has cognizance. *FTC* v. *Motion Picture Advertising Co., Inc.*, 344 U. S. 392, 394. Under the licensing provisions of the Communications Act, the expertise of the Commission was intended to play continually upon the delicate function of licensing a scarce communication medium. *National Broadcasting Co.* v. *United States*, 319 U. S. 190.

But now petitioners urge, in justification of § 3.636, that a general rule incorporating numerical proscription of multiple ownership is necessary because, unlike a case-by-case analysis, a general rule will obscure "uncertainties . . . in a realm where particular evils are not readily susceptible of proof." (Pet. 12) If each administrative agency to which Congress has given power to resolve "uncertainties . . . not readily susceptible of proof" attempts to settle those uncertainties simply by announcing general rules, the rationale for creation of the agency disappears. If blocks of license applications are, by unreflective decisions dictated by general rules, to be presumed unlawful, the purpose of having a Commission is lost. The agency may as well give way to the Congress.

* * *

We submit that this case was correctly decided below and that it is not in conflict with any decision of this Court or of any other court. The judgment here is that of the Court of Appeals of the District of Columbia Circuit, the court to which Congress has seen fit to confine all appeals from licensing proceedings in the Commission. [47 U. S. C. § 402(b)] Such limitation of review to the court below entitles its rulings on the licensing procedures of the Communications Act to particularly great weight.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 1955.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,065

STORER BROADCASTING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, AND THE FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petition for Review of Order of the Federal Communications Commission

Decided February 24, 1955

Mr. Albert R. Connelly, with whom *Messrs. Thomas H. Wall* and *George B. Turner* were on the brief, for petitioner. *Messrs. Fred W. Albertson* and *Clair L. Stout* entered appearances for petitioner.

Mr. Daniel R. Ohlbaum, Counsel, Federal Communications Commission, with whom *Messrs. Warren E. Baker,* General Counsel, Federal Communications Commission, and *J. Smith Henley,* Assistant General Counsel, Federal Communications Commission, were on the brief, for respondents. *Messrs. Charles H. Weston,* Attorney, Department

of Justice, and *J. Roger Wollenberg, Richard A. Solomon* and *Richard J. Snider*, Counsel, Federal Communications Commission, entered appearances for respondents.

Before WILBUR K. MILLER, PRETTYMAN and BAZELON, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* Storer Broadcasting Company filed with the Federal Communications Commission August 31, 1953, an application for a new television station in Miami, Florida. Storer was then already licensed to own and operate five standard broadcast and five frequency modulation broadcast stations, located in Atlanta, Detroit, Miami, Toledo and Wheeling; and three television stations, located in Atlanta, Detroit and Toledo. Its wholly-owned subsidiaries were then licensed to own and operate standard broadcast and television stations in Birmingham and San Antonio.

In a proceeding initiated some years before by issuance of a notice of proposed rule making, in which Storer participated, the Commission entered an order November 25, 1953, promulgating amended "multiple ownership" rules, which are now §§ 3.35, 3.240 and 3.636 of its Rules and Regulations. On the same day the Commission dismissed Storer's application for a television station in Miami, without a hearing and without consideration on the merits, on the ground that its grant would be in violation of the spirit and purpose of the multiple ownership rules.

Storer petitions for review, asking that we de-

clare unlawful and without force or effect the Commission's rule making order of November 25, 1953, together with the amended multiple ownership rules promulgated thereby, insofar as and to the extent that the order and rules

> "(a) Deny the right to a full and fair hearing to determine whether ownership, operation or control of more than seven (7) standard radio, seven (7) FM radio, and five (5) television broadcast stations, upon application therefor, will serve the public interest, convenience or necessity.
>
> "(b) Provide that ownership of one (1%) per cent or more of the voting stock of a corporation shall be considered as equivalent to ownership, operation or control of such station in determining the existence of a concentration of control contrary to the public interest, convenience or necessity."

The multiple ownership rules are challenged here only insofar as they impose an absolute limitation upon the number of standard, FM and television broadcast stations which may be owned, operated or controlled by a single individual or corporation. The three rules under attack are similar except for the differing maximum numbers of stations which are permitted,—seven in standard, seven in FM, and five in television. We quote as typical the television broadcast rule, § 3.636:

> "Section 3.636 *Multiple Ownership*—(a) No license for a television broadcast station shall

be granted to any party (including all parties under common control) if

"(1) Such party directly or indirectly owns, operates, or controls another television broadcast station which serves substantially the same area; or

"(2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with the public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. *The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations.*" (Italics supplied. The italicized material is common to all three rules.)

Unequivocally, the foregoing rule declares that an application for a television broadcast station license filed by one who is already licensed for five such stations will be rejected; that the Commission will *in any event* consider that the addition of a sixth station would result in concentration of control contrary to the public interest, convenience or necessity.

This means, of course, that an application for a sixth television station will be denied without a hearing, just as Storer's application was rejected without a hearing and without any consideration of the question whether public interest, convenience or necessity would be served by the grant.

Section 309(a) of the Communications Act requires the Commission to grant an application for a station license if it finds, upon examination thereof, that public interest, convenience and necessity would be served by the granting thereof. If the Commission is unable so to find, after examining an application, it is required by § 309(b) of the Act to notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. It is further provided that, if the Commission, after considering the applicant's reply to its notice, is still unable to make a favorable finding and so is unable to grant the application without a hearing,

> ". . . It shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such

> action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant."

This is mandatory language. The Supreme Court said in *Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. 327, 330 (1945):

> ". . . § 309(a) not only gives the Commission authority to grant licenses without a hearing, but also gives applicants a right to a hearing before their applications are denied. . . ."

Again, at page 333, the court said:

> ". . . Congress has granted applicants a right to a hearing on their applications for station licenses. Whether that is wise policy or whether the procedure adopted by the Commission in this case is preferable is not for us to decide. . . ."

Moreover, the denial of a hearing granted by statute is a denial of due proces of law. *L. B. Wilson, Inc.* v. *F. C. C.*, 83 U. S. App. D. C. 176, 170 F. (2d) 793 (1948).

This does not mean, however, that any person who applies for any frequency at any location is entitled to a hearing before his application may be denied, for there are situations in which the Commission may reject an application without a hearing. For example, if an applicant admits he is an alien, his application will be denied without a hearing because he is disqualified by statute; or, if he denies he is an alien but is found to be such after a hearing conducted on that issue, his application will be dismissed without further hearing.

If an application seeks a license for an unlawful use or purpose, it will be rejected without a hearing. *F. C. C.* v. *American Broadcasting Co.*, 347 U. S. 284 (1954).

Moreover, if an applicant applies for a certain frequency at a location to which that frequency has not been assigned, his application will be dismissed without a hearing as not conforming to the Commission's master plan—arrived at through one master hearing—for the allocation of television frequencies, under which at least one television channel has been assigned to each of over one thousand cities and towns throughout the nation. The actual assignment of channels to operators is by application, but all applications for licenses not conforming to the overall plan are automatically dismissed. This plan was upheld by us in *Peoples Broadcasting Co.* v. *United States*, 93 U. S. App. D. C. 78, 209 F. (2d) 286 (1953), and in *Logansport Broadcasting Corp.* v. *United States*, 93 U. S. App. D. C. 342, 210 F. (2d) 24 (1954).

In the latter case we said, at page 345:

> "The fair interpretation of Sections 303 and 307 (b), when read together, is that the Commission may allocate channels among communities either by passing upon specific applications or by way of rule making. Situations are not infrequent in which an administrative agency can properly proceed either through rule making or adjudication: in such a case, the choice 'is one that lies primarily in the informed discretion of the administrative agency.' Securities and Exchange Commission v. Chenery Corporation, 1947, 332 U. S. 194, 203, 67 S. Ct. 1575, 1580, 1760, 91 L. Ed. 1995. After its experience in distributing FM radio frequencies pursuant to an allocation plan, and distributing AM frequencies in response to specific applications, the Commission has decided that by means of an allocation plan a more equitable distribution of television channels can be effected. We do not think this was an abuse of discretion. . . ."

In the light of such exceptions to the apparently unqualified generality of § 309(b), the statutory provision means that any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected.[1]

The rule in question here is not a mere announce-

[1] Cf. *Stahlman* v. *F. C. C.*, 75 U. S. App. D. C. 176, 126 F. (2d) 124 (1942).

ment that the Commission has adopted the policy of considering, in every case in which the owner of five television stations applies for an additional license, whether the grant thereof would result in such concentration of control as to be adverse to the public interest. The rule goes further and says the Commission will "in any event" treat the numerical limit as the boundary of public interest, and will deny a hearing to the owner of five television stations upon his application for an additional station. Thus the Commission freezes into a binding rule a limitation upon its consideration of the public interest in a respect in which the facts and circumstances may differ widely from case to case. It has decided *in vacuo* that there can never be an instance in which public interest, convenience and necessity would be served by granting an additional license to one who is already licensed for five television stations. The power so to decide has not been committed to the Commission.[2]

It is conceivable that in some circumstances, com-

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[2]Cf. the *Stahlman* opinion, cited in footnote 1; in which Judge Groner said, at page 179:

> "If in this case it had been made to appear, as counsel for appellant insist, that the Commission's investigation was solely for the purpose of the consideration or adoption of a hard and fast rule or policy, as the result of which newspaper owners may be placed in a proscribed class and thus made ineligible to apply for or receive broadcast licenses, we should be obliged to declare that such an investigation would be wholly outside of and beyond any of the powers with which Congress has clothed the Commission. For we have previously held that there is nothing in the Act which either prevents or prejudices the right of a newspaper, as such, to apply for and receive

mon ownership of even five television stations, though permitted by the challenged rule, might be undue concentration of control; while in other circumstances, common ownership of a greater number might be compatible with the public interest. But whether so or not must be determined on an *ad hoc* basis, after consideration of all factors relevant in the determination of whether the grant of a license would be within the comprehensive concept which the Act calls "the public interest, convenience, or necessity." Cf. *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 89 U. S. App. D. C. 13 189 F. (2d) 677 (1951), as to the broad scope of the concept. The selection of a certain number, such as five or seven, as a maximum beyond which no multiple owner will be permitted to go regardless of what he may be able to show in his own behalf, is not only inconsistent with but is contrary to the mandatory provisions of § 309(b) of the Act and, with respect to the applicants described in the rule would in effect repeal or nullify that important section.

The Commission argues that the challenged rules[3]

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a license to operate a radio broadcast station. Tri-State Broadcasting Co. v. Federal Communications Comm., 68 App. D. C. 292, 96 F. 2d 564. Further consideration confirms that view."

[3]Although only § 3.636 of the Commission's Rules, concerning multiple ownership of television stations, is directly involved here, the parties have treated the case as though all three sections of the multiple ownership rules were under direct attack. As the challenged portion of § 3.636 appears *verbatim* in the other two sections, it would of course be held invalid should occasion arise to consider it on the complaints of multiple owners of AM and FM stations.

carry out its established policy of encouraging as many qualified persons as possible to seek broadcast licenses, as the public interest requires maximum diversification of program and service viewpoints; and that they also carry out the general policy of favoring competition which Congress wrote into the Communications Act. The multiple ownership rules are, the Commission says, "therefore a formulation of *Commission* policy in the licensing of stations, which is based in part upon enunciated Congressional policy applicable to radio broadcasting." We are not here concerned with the Commission's *policy* in passing upon applications. We are concerned with what purports to be a binding rule.

However laudable its policies may be, we have seen that the Commission is bound by its own statute and by the requirements of due process to grant a full hearing before denying an application for an available frequency sought by a citizen for a lawful use. We hold invalid the portion of § 3.636 of the Commission's Rules which we italicized in quoting it at length earlier in this opinion, and direct that it be eliminated therefrom. This holding will not prevent the Commission from considering in each case, in accordance with its announced policy, the question whether granting an additional license to one who is already a multiple owner would place too much control in one licensee, contrary to the public interest. But the multiple owner applicant must be given a chance in a hearing to show, if he can, that still another station will not give him such con-

trol of communications media as to prejudice the interests of the public.

This proceeding, being on petition for review of the rule making order of November 25, 1953, filed under § 402(a) of the Act, does not bring before us the order of the same date which denied the application of Storer Broadcasting Company for a television station license at Miami—which order was appealable under § 402(b). But, in view of our holding here, the Commission probably will *sua sponte* set aside the order of denial and grant Storer a hearing.

Challenged rule modified and case remanded.

Filed FEBRUARY 24, 1955

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,065 January Term, 1955.

STORER BROADCASTING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petition for Review of Order of the Federal Communications Commission.

Before: Wilbur K. Miller, Prettyman, and Bazelon, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is hereby ordered and adjudged by this Court that the order of the Federal Communications Commission adopted November 25, 1953, so far as it amends Section 3.636 of its Rules and Regulations by including therein the following language:

> "The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest,

convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations."

be, and the same is hereby, determined to be invalid, and that this case be, and it is hereby, remanded to the Federal Communications Commission with directions to eliminate the foregoing language from Section 3.636 of its Rules and Regulations.

Dated: February 24, 1955.
Per Circuit Judge Wilbur K. Miller.
Filed: FEBRUARY 24, 1955

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IN THE

Supreme Court of the United States

October Term, 1955

No. 94

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

—against—

STORER BROADCASTING COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

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February 6, 1956.

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IN THE

Supreme Court of the United States

October Term, 1955

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Petitioners,* —*against*— STORER BROADCASTING COMPANY, *Respondent.*	No. 94

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

Opinion Below

The opinion of the court of appeals (R. 46-52) is reported at 220 F.2d 204. The Report and Order of the Federal Communications Commission adopting the rule in issue (R. 16-27) and that rule (R. 29) appear at 18 FED. REG. 7796-7800.

Jurisdiction

The judgment of the court of appeals was entered February 24, 1955 (R. 52). The petition for writ of certiorari was filed May 23, 1955, and was granted October 10, 1955 (R. 53). Petitioners invoke the jurisdiction of this Court under 5 U. S. C. § 1040 and 28 U. S. C § 1254(1).

Question Presented

Whether the statutory power of the Federal Communications Commission to make rules and regulations "not inconsistent with law" authorized the Commission to proscribe ownership of interests in more than five television stations by § 3.636 of the Commission's Rules and Regulations, which

(a) as construed by the Commission, denies an applicant for a lawful use of an available frequency the hearing on the issue of public interest required by Section 309(b) of the Communications Act of 1934;

(b) converts the statutory standard of public interest into a conclusive numerical presumption; and

(c) was promulgated by an order that failed to disclose an adequate basis for relating the specific numerical limitation to the public interest.

Statutes and Regulation Involved

The pertinent substantive sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151-609, are as follows:

Section 309

"(a) If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

"(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify

the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying particularly the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant." [47 U.S.C. § 309]

Section 311

"The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly con-

trolled by such person) whose license has been revoked by a court under section 313." [47 U.S.C. § 311]

Section 313

"All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however*, That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court." [47 U.S.C. § 313]

The pertinent rule making sections of the Communications Act are as follows:

Section 4

* * *

"(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." [47 U.S.C. § 154 (i).]

Section 303

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall——

* * *

"(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: * * *

* * *

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, * * *." [47 U.S.C. § 303.]

The pertinent portion of Regulation § 3.636 provides:

"*Multiple Ownership.* (a) No license for a television broadcast station shall be granted to any party (including all parties under common control†) if:

"†The word 'control' as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

* * *

"(2) Such party, or any stockholder, officer or director of such party, directly or indirectly owns,

operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenien or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations.† [47 C.F.R. § 3.636 (1953)]

"†In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 per cent or more of the outstanding voting stock."

Statement

The proceeding below was instituted January 22, 1954, by respondent Storer Broadcasting Company (Storer) to set aside a Report and Order (Order) of the Federal Communications Commission.* The Order, dated November 25, 1953 (R. 16-27), promulgated the revisions that are

*Under Section 402(a) of the Communications Act of 1934, 47 U. S. C. § 402(a); Section 4 of the Judiciary Review Act of 1950, 5 U.S.C. § 1034; and Section 10 of the Administrative Procedure Act of 1946, 5 U.S.C. § 1009 (R. 33-38).

§§ 3.35, 3.240 and 3.636 of the Rules and Regulations of the Commission (47 C. F. R. §§ 3.35, 3.240, 3.636 (1953); R. 27-29). Those revised rules relate to the multiple ownership by licensees of interests in radio and television broadcast stations.

The revised rules provide generally that no license will be granted if the grant "would result in a concentration of control of . . . [broadcast stations] . . . in a manner inconsistent with public interest, convenience, or necessity." That standard is converted into a conclusive numerical presumption by the further provision of the rules that: "The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or director to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than" seven standard (AM) [§ 3.35], seven frequency modulation (FM) [§ 3.240] or five television (TV) [§ 3.636] broadcast stations (R. 27-29), regardless of the location, power or any other factor affecting the size of the audiences reached by the stations.*

At the time the rules were adopted, Storer (or wholly-owned subsidiaries) held licenses to operate 7 AM stations, 5 FM stations and 5 TV stations, the latter all being VHF stations (R. 35). Storer then also had on file with the Commission a pending application for a sixth TV station in the VHF band (R. 35-36, 39). Simultaneously, with

*Effective October 22, 1954, to encourage use of the ultra high frequency (UHF) band, § 3.636 was amended to permit ownership of interests in a total of seven television stations, only five of which, however, might be in the very high frequency (VHF) band. 19 FED. REG. 6102.

promulgation of its numerical proscription rules the Commission dismissed the pending Storer application, without a hearing (R. 39-44), on the ground that the application violated "the spirit and purposes of Section 3.636 . . . of our Rules" (R. 42). Storer thereupon filed its petition for judicial review of the numerical proscription rules (R. 33-38).

The judgment of the court below sets aside so much of § 3.636 as conclusively presumes that there would be a concentration of control contrary to the "public interest, convenience, and necessity" for any person to have an interest in more than 5 TV broadcasting stations (R. 52-53).

The decision of the court of appeals has two bases. It rests, first, upon those terms of Section 309(b) of the Communications Act (*supra*, pp. 2-3) that give applicants a right to a hearing on the issue of public interest. The court below held that except to the extent that the Congress itself had defined the public interest affecting an individual application for a license, the statutory right to a hearing was unqualified; and that

> " . . . any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected." (R. 50)

As a second basis for its decision, the court of appeals observed that the Commission may not freeze

> " . . . into a binding rule a limitation upon its consideration of the public interest in a respect in which the facts and circumstances may differ widely from case to case." (R. 50)

Summary of Argument

I

The numerical proscription rules of the Commission are invalid since, as interpreted by the Commission, they deny the statutory right of a license applicant to that hearing guaranteed by Section 309(b) of the Communications Act. Denial by an administrative agency of a statutorily ordered hearing is a denial of due process under the Fifth Amendment of the Constitution.

Section 309(b) of the Communications Act declares that if the Commission is unable to find that public interest, convenience and necessity would be served by the granting of an application, it shall forthwith notify the applicant of the grounds and reasons for its inability to make such finding and give the applicant an opportunity to reply. If the Commission, after considering such reply is still unable to make that finding,

> "... it shall formally designate the application for hearing upon the grounds or reasons then obtaining. ..."

The numerical proscription rules deny such hearing. The Commission by these rules has ordered, in effect, that one evidentiary fact—the number of licenses held by the applicant—shall be conclusive evidence, irrespective of all other facts and circumstances, of the ultimate fact of "public interest" which the Act requires the Commission to determine.

Storer concedes that Section 309(b) does not require the Commission to hold a hearing before denying a license to operate a station in ways contrary to those that the

Congress has determined are in the public interest. When, however, the question of who shall receive a license for a lawful use of an available facility is reached, the Congress has not conferred upon the Commission any authority to establish rigid classifications of applicants so as to deprive them of that right of hearing granted by the Congress.

II

The order of the Commission states that the rules were promulgated

> ". . . to implement the Congressional policy against monopoly enunciated specifically in Sections 311 and 313 of the Communications Act." (R. 19)

Apparently recognizing that the rules cannot be sustained on that basis, petitioners now argue that the rules may nevertheless be sustained as an implementation of a commission policy—stated to be a policy different from the congressional policy against monopoly—to promote diversification of ownership to insure a maximum diversification of program and service viewpoints.

An administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained. Although the Commission may not justify its action on a ground different from that upon which such action was taken, the fact is that the rules cannot be sustained on either of the grounds advanced by petitioners.

The numerical proscription rules cannot be sustained as an implementation of congressional antimonopoly policy. Viewed as a purported implementation of those laws, the

numerical proscription rules constitute a determination that the acquisition by any one person of an interest in more than the specified number of broadcast stations has an economic effect contrary to the policies of the antitrust laws, without regard to the facts concerning the actual or potential effect of such acquisition upon competition. That determination is squarely in conflict with the express provisions of the anti-trust laws requiring analysis of economic consequences.

Moreover, the numerical proscription rules cannot be sustained as an implementation of the Commission's purported program-diversification policy. Although diversification of program and service viewpoints is one of a number of proper objectives of the Commission, the rules here under attack bear no relation to that end. The rules preclude consideration of the program and service viewpoints actually available in any service area; they apply to ownership of stations serving wholly different areas; they exclude an otherwise qualified applicant for a given broadcast facility in an area which is not served by any existing facility, even where there is no other qualified applicant, and, finally, they exclude a multiple owner from areas in which there are more unlicensed facilities than qualified applicants and to which area such owner would bring an additional viewpoint. Those results clearly are not in the public interest.

To the extent that the numerical proscription rules are intended, as petitioners suggest, to close the door to individual hearings "in a realm where particular evils are not readily susceptible of proof" (Pet. for Cert., p. 12) adoption of the rules debases performance of the Commission's administrative function.

III

The Administrative Procedure Act requires that the Commission "shall incorporate in any rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 1003(b).

In its Order the Commission made no attempt to show that the specific numbers bore any rational relationship to "concentration of control" of broadcasting "contrary to the public interest, convenience, or necessity." No showing whatsoever was made of any way in which the specific ceiling numbers would operate to serve the public interest.

The failure of the Commission to relate its choice of numbers to the avowed purpose of the rules results from the fact that the Commission has no facts or experience upon which to base its numerical formulae and that the number of licenses, per se, bears no relationship to concentration of control.

ARGUMENT

POINT I

THE NUMERICAL PROSCRIPTION RULES ARE INVALID BECAUSE THEY PURPORT TO AUTHORIZE DENIAL BY THE COMMISSION OF A LICENSE APPLICATION WITHOUT A HEARING AND A DETERMINATION OF PUBLIC INTEREST, CONVENIENCE AND NECESSITY.

The court of appeals concluded that selection of a maximum figure beyond which multiple ownership of TV broadcast stations will not be permitted, regardless of what an applicant might be able to show with respect to the public interest, is contrary to the mandatory hearing provisions

of Section 309(b) of the Communications Act and would in effect repeal or nullify that important section (R. 51).

Section 309(b) declares that if the Commission shall be unable to find that the public interest, convenience or necessity would be served by the granting of an application, it shall forthwith notify the applicant of the grounds and reasons for its inability to make such finding and give the applicant an opportunity to reply. If the Commission, after considering such reply is still unable to make that finding

> ". . . it shall formally designate the application for hearing on the grounds or reasons then obtaining. . . ."

That hearing requirement of Section 309(b) reflects a technique, conceived as necessary by Congress, to assure that administrative control will continually be abreast the dynamic aspects of radio transmission. As this Court has noted, the whole Communications Act, including both its rule-making and licensing procedures is pregnant with

> ". . . recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138.

Thus, since the Act of 1927, application in licensing proceedings of the standard of public interest has been governed by comparative considerations, on a case-by-case basis.* That technique, carried into the Communications

National Broadcasting Co. v. United States, 319 U. S. 190, 217; FEDERAL RADIO COMM'N ANN. REP., 169-170 (1928).

Act of 1934, gains expression, among other places, in Section 309(b) which

> "... gives applicants a right to a hearing before their applications are denied." *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327, 330.

The decision below is entirely consistent with the carefully reticulated licensing and rule making scheme that Congress wrote into the Communications Act. That decision does not construe Section 309(b) either (1) to bar promulgation by the Commission of substantive rules applicable to license proceedings or (2) to require that its powers in this respect be limited to the matters specifically itemized in Section 303. It simply accords with those decisions of this Court that say that under Section 309(b) the Commission must grant a hearing to an applicant to determine the "public interest, convenience, and necessity" before denying a license for a lawful use of an available frequency [*Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327; *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470], and holds that the Commission may not by substantive rule essay to preclude that hearing.

We recognize, of course, that Section 309(b) does not require the Commission to hold a hearing on the issue of public interest before denying a license under a rule of the Commission if the Congress has itself so defined the public interest as to preclude the grant. *Felman* v. *United States*, 339 U.S. 973 (rules prohibiting licensing an applicant who proposes to transfer by contract to a third person part of the licensee's responsibility for the operation of the station in violation of Section 301 of the Communications Act); *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (rule prohibiting licensing an applicant who proposes

to broadcast lotteries in violation of Section 1304 of the United States Criminal Code [18 U.S.C. § 1304]); *Logansport Broadcasting Corp.* v. *United States*, 210 F.2d 24 (D.C. Cir.) (rule prohibiting licensing an applicant who proposes to disrupt "equitable distribution of radio service" among the several states and communities in violation of Section 307(b) of the Communications Act).* Other provisions of the Communications Act similarly obviate any requirement that the Commission hold a hearing on the issue of public interest before denying a license to an applicant who is an alien (Section 310) or whose prior license has been revoked by a court for antitrust law violation (Section 311).

In all such cases, the Congress has barred the possibility of a commission finding, prerequisite to the grant of a license, that the license would serve the public interest.**

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*The rule treated in the *Logansport* case related to that "fair, efficient and equitable distribution of radio service" which Section 307(b) requires the Commission to accord the several states and communities. Administration of the requirements of Section 307(b) necessarily works a limitation upon the power of the Commission to apply the standard of "public interest" in considering an individual license application. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 215. That limitation was aptly explained by the Federal Radio Commission when discussing the Davis amendment of March 28, 1928 [45 Stat. 373 § 5], the statute from which Section 307(a) and (b) was derived in enactment of the Communications Act. Of the Davis amendment, the Federal Radio Commission said:

> " . . . it is true that the commission may on occasions be forced to deny an application the granting of which might, in its opinion, serve public interest, convenience, or necessity. The Davis amendment may, therefore, be viewed as a partial limitation upon the power of the commission in applying the standard." FEDERAL RADIO COMM'N ANN. REP. 166 (1928).

**Under Section 309(b), the right to a hearing depends on whether the issue of the public interest affecting an individual application is open for determination by the Commission, and not, as petitioners perhaps imply (Pet. Br. p. 16, fn. 9), on whether the

Clearly, the Commission is not required to grant a hearing to a license applicant who admittedly intends to carry on activities that statutes declare are contrary to the public interest.

When, however, the question of who should receive a license for a lawful use of an available facility is reached, the Congress has not conferred upon the Commission any authority to establish rigid classifications of applicants for licenses to the end that applicants may be deprived of their right of hearing. Only a case-by-case analysis and comparison of all relevant factors as to each applicant's ability to serve the public interest can meet the requirements of the Communications Act. *National Broadcasting Co.* v. *United States,* 319 U.S. 190; *Stahlman* v. *FCC,* 126 F.2d 124 (D.C. Cir.).

Petitioners' apparent reliance on *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (Pet. Br. pp. 10, 11, 19-23), as support for its position in the instant case is wholly misplaced. Although the chain broadcasting regulations, sustained in the *NBC* case, included a regulation (phrased in language no less mandatory than that in the rule here attacked) prohibiting a network from owning or controlling more than one station in a given service area, this Court was careful to note that

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Commission is invoking a technical rule or a non-technical rule. Thus, in *New York Municipal Broadcasting System* v. *FCC,* 223 F.2d 637 (D.C. Cir.), a licensee authorized to operate broadcast transmitters at powers of 1 and 5 kilowatts applied for authority to install a single transmitter having a rated power of both 1 and 5 kilowatts. The Commission denied the application without a hearing, relying upon a technical rule (§ 3.41) fixing the maximum rated power of any broadcast transmitter in relation to its authorized power. The court held that the applicant was entitled to a hearing because the rule in question was not of the character encompassed in the exceptions to the generality of Section 309(b) which it had delineated in *Storer*—in other words, because the Congress has not itself defined the public interest in respect of a single transmitter having multiple power ratings.

> ". . . . The Commission . . . did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.'" (319 U.S. at 225)

That statement of the Court in the *NBC* case must be read in the light of commission recognition in the chain broadcasting regulations of a duty to preserve to a license applicant the statutory right to a hearing. Thus, in issuing those regulations, the Commission explicitly stated that a determination of the requirements of the public interest would, in spite of the regulations, still have to be made in passing upon particular applications. It stated:

> "Announcements of policy may take the form of regulations or of general public statements. In either case, the applicant's right to a hearing on the question whether he does in fact propose to operate in the public interest is fully preserved. The regulations we are adopting are nothing more than the expression of the general policy we will follow in exercising our licensing power. The formulation of a regulation in general terms is an important aid to consistency and predictability and does not prejudice any rights of the applicant." FCC, REPORT ON CHAIN BROADCASTING (Docket No. 5060) 85 (1941).

Indeed, the Commission unsuccessfully resisted judicial review of those regulations, contending that, since they were characterized as announcements of policy, the order promulgating them was no more subject to review than a press release similarly announcing its policy. *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 422.

In his dissenting opinion in that case, Mr. Justice Frankfurter noted, in support of the Commission's contention, that:

> "... Congress established an administrative procedure under which the Commission must make a specific determination in each case whether the public interest would be served by granting the particular application before it. No announcement of general licensing policy can relieve the Commission of its statutory obligation to examine each application for a license and determine whether a grant or denial is required by the public interest." (316 U.S. at 432)

And in the *NBC* case itself, the petitioners stated, in their brief to this Court (at page 77):

> "Nor is there any basis for the suggestion (NBC Br. 87; CBS Br. 49) that the regulations are 'iron bound' and constitute an abdication by the Commission of all discretion. The Commission must apply the statutory standard of public interest, convenience or necessity to each application for a license in the light of the facts pertinent to the application. Each applicant (unless his application is granted without a hearing) is entitled to a hearing not only that he may have an opportunity to show that he is entitled to a grant of an application under the established policies of the Commission, but also that he may show, if necessary, that such policies are not appropriate in his particular situation."

The meaning of the decision in the *NBC* case is, as petitioners had urged it should be, that the Communications Act entitles each applicant for a license to a hearing in order that he may show that established commission

"policies are not appropriate in his particular situation". See *Thomas S. Lee Enterprises, Inc.*, 5 PIKE & FISCHER RADIO REG. 1179. That being so, petitioners' present contention (Pet. Br. pp. 10-11, 26-27) that an application may be dismissed without a hearing if it clashes with "policy judgments which the rule embody" is wholly inconsistent with their position in the *NBC* case and with this Court's decision in that case.

Petitioners have referred (Pet. Br. p. 23) to the waiver provisions of the Commission's Rules (§§ 1.701 and 1.702, 47 C. F. R. §§ 1.701, 1.702) as a method by which "in the instant case, the Commission may amend the multiple ownership rules as the public interest requires". Those waiver provisions are beside the point in this case since, as the Commission itself has stated, under Section 4(d) of the Administrative Procedure Act [5 U.S.C. § 1003(d)] it is not required when considering applications made pursuant to those provisions "to hold a hearing, or to engage in any other public rule-making proceedings." *Potomac Broadcasting Corp.*, 6 PIKE & FISCHER RADIO REG. 559, 564.

The question here is whether despite Section 309(b), the Commission may, as it did with Storer, deny an application for a license without granting a hearing and an opportunity to show that the substantive policies of the Commission are not appropriate in the applicant's particular situation. The statutory requirement of a hearing prior to adverse action by the Commission is not satisfied by anything less than a hearing. *FCC* v. *National Broadcasting Co. (KOA)*, 319 U.S. 239 (holding that the statutory requirement of a hearing prior to modification of a license under Section 312(b) of the Act was not satisfied merely

by providing an opportunity to file briefs and present oral argument).

The Congress, only recently, has indicated its understanding that the Commission may not, under present law, promulgate rules that create rigid classifications of applicants. The House version of S. 658, 82d Cong., 2d Sess., proposed an amendment of Section 308 of the Communications Act, as follows:

> "(d) The Commission shall not make or promulgate any rule or regulation, of substance or procedure, the purpose or result of which is to effect a discrimination between persons based upon interest in, association with, or ownership of any medium primarily engaged in the gathering and dissemination of information and no application for a construction permit or station license, or for the renewal, modification, or transfer of such permit or license, shall be denied by the Commission solely because of any such interest, association, or ownership."

A Conference Committee considered both the Senate and House bills. The bill, as reported out by the conference, was thereafter approved by both Houses and signed by the President. Although the bill did not contain the amendment, the Conference Report makes abundantly clear the reason for its omission:

> ". . . . This provision was omitted from the conference substitute because the committee of conference felt that it was unnecessary. It is the view of the conference committee that under the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or association with,

> a newspaper or other medium for gathering and disseminating information. Also the Commission could not arbitrarily deny any application solely because of any such interest or association." H. R. REP. No. 2426, 82d Cong. 2d Sess. 18-19.

POINT II

THE NUMERICAL PROSCRIPTION RULES ARE INVALID BECAUSE NOT IN ACCORDANCE WITH LAW, AND BECAUSE THEY ARE ARBITRARY AND CAPRICIOUS.

The Order states that the purpose of the numerical proscription rules is "to implement and enforce the [Communications] Act" (R. 18) and refers exclusively to Sections 311, 313 and 314 of the Act for the substantive provisions that purportedly authorize adoption of such rules (R. 27). Those three sections relate solely to the applicability of the antitrust laws to broadcasting. The Order also states that the rules were promulgated

> ". . . to implement the Congressional policy against monopoly enunciated specifically in Sections 311 and 313 of the Communications Act." (R. 19)

There can be no doubt, therefore, that at the time of the adoption of the rules the Commission intended them as an implementation of the antitrust laws and that their purpose was to safeguard the public against "monopoly".*

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*The Commission has heretofore consistently related its multiple ownership rules solely to problems of monopoly and competition. When it adopted its first numerical limitation on TV station ownership in 1940, it stated:

> "Monopoly must be avoided. Free competition is to be promoted and preserved." FCC, REPORT AND ORDER (Docket No. 5806) 28-29, May 28, 1940.

Similarly, the Commission described its original FM multiple ownership rules as intended "to safeguard the public against monopoly." FCC, Mimeo. 41739, June 22, 1940.

Apparently recognizing that the rules cannot be sustained on that basis, petitioners now argue that the action of the Commission may nevertheless be upheld as an implementation of a commission policy—stated in their brief (Pet. Br. p. 30) to be a policy different from the congressional policy against monopoly*—to diversify ownership in order to "maximize diversification of program and service viewpoints."

An administrative order will not be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained. *SEC* v. *Chenery Corp.*, 318 U.S. 80. Although the Commission may not justify its action on a ground different from that upon which such action was taken, the rules cannot be sustained upon either of the grounds alleged by petitioners.

A. The Numerical Proscription Rules Cannot be Sustained as an Implementation of Congressional Antimonopoly Policy.

The Congress has never enacted any antimonopoly legislation applicable to broadcasting which differs in any respect from the law applicable to other business. Section 313 of the Communications Act (which the Commission has said the rules are meant to implement) merely declares applicable to radio communications all

*In the Order, however, the Commission considered its "diversification principle" to be but an implementation of the antitrust laws. It stated that it had

> ". . . adhered to the principle of 'diversification' in order to implement the Congressional policy against monopoly and in order to preserve competition." (R. 21)

> "... laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade. ..."*

It may be conceded that the Commission has power to apply Section 313 by refusing licenses where the grant would result in a violation of any of the laws embraced by that section and, indeed, to take into account, in determining whether public interest requires the granting or withholding of a license in any given situation, competitive practices falling short of positive violation of the antitrust laws. *Mansfield Journal Co.* v. *FCC*, 180 F.2d 28 (D.C. Cir.). But, as this Court held in *FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 290, the Commission's power to adopt general rules purporting to apply specific federal laws is limited by the scope of those laws.

Viewed as a purported implementation of the antitrust laws, the numerical proscription rules constitute a determination by the Commission that the acquisition by any one person of an interest in more than the specified number of broadcast stations has an economic effect contrary to the policy of the antitrust laws, without regard to the facts concerning the actual or potential effect of such acquisition upon competition. That determination is squarely in conflict with the express provisions of the antitrust laws requiring analysis of economic consequences. The Commis-

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*The other antimonopoly sections of the Communications Act referred to in the Order are:

Section 311 (*supra*, pp. 3-4) which requires the Commission to refuse a license or permit to any person "whose license has been revoked by a court under Section 313", and

Section 314 which forbids common ownership, control or operation of radio and cable in international communication where the purpose or effect may be substantially to lessen competition, restrain commerce or unlawfully to create a monopoly.

sion must, of course, consider the special nature of the industry in determining what activities or acquisitions may substantially lessen competition [*FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 98], but it cannot rewrite the antitrust laws and hold that an acquisition having no effect or an insubstantial effect upon competition may substantially lessen competition.

The scope and extent of the policy underlying the antitrust laws is a legal question peculiarly within the province of the courts [*FCC* v. *RCA Communications, Inc.*, 346 U.S. 86], which have consistently held that questions of actual or potential antitrust law violation must be decided on the basis of all relevant facts with respect to competition. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528-29, 531.

Basic to a determination of the effect on competition of any proposed acquisition are such factors as the purpose of such acquisition, the existence, number, activity and strength of competitors in the market affected by the acquisition, the size and location of the acquiring interest and the size and location of the interest proposed to be acquired. *United States* v. *Columbia Steel Co., supra*, at 527-28; *Transamerica Corp.* v. *Board of Governors of Federal Reserve System*, 206 F.2d 163, 169-70 (3d Cir.). The numerical proscription rules preclude consideration of any of those factors.

But such factors, important from the antitrust standpoint in all fields of activity, require special consideration in the field of radio and television broadcasting. Radio and television stations differ substantially in important respects such as their geographical location, power, frequency, population served, hours of operation, pattern of coverage,

protection from interference by other stations and other like factors. *Radio Voice of Springfield, Inc.*, 3 PIKE & FISCHER RADIO REG., 2010, 2014. In each of its rules, the Commission explicitly recognizes that those factors must be considered whenever an applicant owns interests in less than the maximum number of stations allowed in the relevant class of service (R. 27-29). Its only excuse for refusing to consider them after an applicant reaches the specified number is that such a course would be "unsatisfactory or unworkable" (R. 22).

To preclude by an absolute numerical limit consideration of all those variable factors departs from long-established antitrust principles and creates an arbitrary and obviously false presumption that a TV station in Butte, Montana, is to be equated with a TV station in New York City.

Apart from such considerations, inquiry into the facts would be necessary even on the Commission's theory that for purposes of the antitrust laws all stations should be regarded as equal and competitive. The Commission's present allocation plan contemplates 1,850 commercial TV stations.* A single TV station thus represents only .00054 of the number provided by existing allocations. By § 3.636, the Commission would foreclose consideration of whether the increase in ownership from .00270 to .00324 of TV stations would, under the facts of a particular case, result in conflict with the policy of the antitrust laws. That determination obviously cannot be made *in vacuo*; it clearly requires thorough study, which § 3.636 precludes, of the facts existing at the time.

**Hearing Before the Subcommittee on Communications of the Senate Committee on Interstate and Foreign Commerce*, 83d Cong., 2d Sess. 142.

The numerical proscription provisions of § 3.636 are, therefore, not only arbitrary; they are in basic and fundamental conflict with the requirement and policy of the antitrust laws that the issue of undue concentration of economic power must be determined in the light of all relevant facts.* As this Court has stated in holding invalid a comparable rule:

> "... The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof, and precludes dispute. This is beyond administrative power." *Miller* v. *United States*, 294 U.S. 435, 440.**

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*Commissioner Doerfer has stated in connection with the action of the Commission in permitting two additional UHF TV stations to be owned by multiple owners of five VHF TV stations:

> "... I am constrained to record my misgivings about linking a numerical evaluation of stations with 'undue concentration of ownership' as an unfailing guide as to what is in the public interest.
>
> "... I have grave doubts as to the wisdom of picking a 'number' without more reliable and persuasive evidence that the number chosen will in all cases mark the upper limits of what will safeguard the public interest. ... There is not much more than intuition as the basis for the present rule." FCC, *Amendment of Section 3.636*, REPORT AND ORDER, 11 PIKE & FISCHER RADIO REG. 1519, 1526.

**Petitioners, seeking to justify the numerical limitation rules of the Commission as an implementation of antimonopoly policy (Pet. Br. p. 35, fn. 24), have referred to four situations in which legislative bodies, although not dealing with monopoly problems, have authorized establishment of standards in numerical terms. In two of the cases cited, *Darby* and *Decie*, which deal, respectively, with minimum wages and liquor licensing, the numerical limitations were fixed by statute, the administrative agency being without discretion to alter those fixed limits. In the *Morris* and *Cox* cases, the legislatures had again fixed numerical limits, but by express delegation had authorized the ad-

B. The Numerical Proscription Rules Cannot be Sustained as an Implementation of the Commission's Program Diversification Policy.

As we have pointed out (*supra*, pp. 22-26), because the rules cannot be sustained on the ground upon which the Commission acted—implementation of antimonopoly policy—they may not now be justified upon another ground. However, even if viewed, as is now suggested by petitioners (Pet. Br. pp. 30-36), as a purported implementation of a commission policy favoring diversification of program and service viewpoints, the rules are equally arbitrary and invalid.

Diversification of program and service viewpoints is one of a number of entirely proper objectives of the Commission. But the rule here under attack bears no relation to diversification of program and service viewpoints. The rule precludes all comparative consideration of the program and service viewpoints available in any service area; it applies to ownership of stations serving wholly different areas. By way of illustration, the maximum area served by a television station is measured by a radius of approximately 60 miles.* The fact that an applicant for a license

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ministrative agencies to adjust the prescribed figure only within narrow ranges.

But respondent does not contend that legislative bodies lack power either to set reasonable numerical limits in implementation of constitutionally proper policies or even to delegate that power by statute. It does contend, however, that there is nothing in the antitrust laws or the Communications Act to suggest that the Congress intended such technique to be applied by the Commission to the control of monopoly. Indeed, the Federal Trade Commission, an agency considerably concerned with the antitrust laws, has suggested that such a tactic by an administrative body defeats the very purpose of the Congress in creating such a body of experts. *Pillsbury Mills, Inc.*, FTC Docket No. 6000 (Dec. 21, 1953).

*FCC, *Television Allocations*, SIXTH REPORT AND ORDER, 1 PIKE & FISCHER RADIO REG., pt. 3, 91:599, 645-57.

for a television station in Miami, Florida, also has an interest in a television station in Detroit, Michigan, cannot have any conceivable relation to the question of program and service diversification in Miami, Florida.*

Furthermore, the rule here set aside excludes an otherwise qualified applicant for a given broadcast facility in an area which is not served by any such existing facility, even where there is no other qualified applicant. Similarly, the rule excludes a multiple owner from areas in which there are more facilities than qualified applicants and into which such owner would bring an additional viewpoint. Those results clearly are not in the public interest and exalt a formula at the expense of the public convenience.

Diversification is but one of the many factors to be considered by the Commission in determining the public interest. It includes not only radio and television, but newspapers, magazines, theatres and similar interests, and it must, as the Commission has frequently held, yield to proof of superiority in other respects. *Aladdin Radio and Television Inc.*, 9 PIKE & FISCHER RADIO REG. 1, 40. To exclude evidence with respect to all those other relevant factors simply because an applicant for a facility in one area has elsewhere acquired the maximum number permitted by the regulations is to sacrifice the public interest upon the altar of administrative convenience and expedience. It is to disregard the warning of this Court that an administrative

*If we correctly understand petitioners' opposition to this contention (Pet. Br. p. 32), it is that even if the station operations of a multiple owner, when viewed in their local service areas, increase the variety of viewpoints available to those areas, the total effect of such operations will be to create uniformity of opinion on the national level. That proposition, phrased somewhat in the terms of Gresham's law, would be that "good competition locally drives monopoly into being nationally."

agency must not place "excessive emphasis" upon a single facet of its responsibility. *Southern S. S. Co.* v. *NLRB*, 316 U.S. 31, 47.

The petitioners suggest (Pet. Br. p. 33) that the rules here under attack are merely an extension of an established diversification policy favoring applicants without newspaper connections in selecting among competing applicants for a license. That policy, however, unlike the numerical proscription rules, has never been treated by the Commission as an absolute prohibition [see *Bamberger Broadcasting Service, Inc.*, 11 F.C.C. 211; *Midland Broadcasting Co.*, 3 PIKE & FISCHER RADIO REG. 1961]; and, furthermore, it is related to diversification within the area served by the station to be licensed [*Scripps-Howard Radio, Inc.* v. *FCC*, 189 F.2d 677 (D.C. Cir.), *cert. denied* 342 U.S. 830].*

*Petitioners' reference to administration by the Commission of its diversification policy favoring applicants without newspaper connections sharply etches the error in their presumption (Pet. Br. p. 39) that because "the Commission may impose *some* limitation upon multiple ownership of broadcasting stations, . . . the selection of a particular ceiling is a matter for the Commission's informed and expert judgment." As we have shown, (*supra*, pp. 20-21), it is the understanding of Congress that the Commission is not authorized to make or promulgate any rule creating rigid classifications of applicants. The Commission in the past has acknowledged this limitation on its authority. (See, S. REP. No. 741, 81st Cong., 1st Sess. 2-3; Opinion of FCC General Counsel Hampson Gary, February 13, 1937). The court below reached the same conclusion in *Stahlman* v. *FCC*, 126 F.2d 124 (D.C. Cir). In that case, while upholding a Commission subpoena issued in an investigation of newspaper-radio ownership, the court stated:

> "If in this case it had been made to appear, as counsel for appellant insist, that the Commission's investigation was solely for the purpose of the consideration or adoption of a hard and fast rule or policy, as the result of which newspaper owners may be placed in a proscribed class and thus made ineligible to apply for or receive broadcast licenses, we should be obliged to declare that such an investigation would be wholly outside of and beyond any of the powers with which Congress has clothed the Commission." 126 F.2d at 127.

We have thus far treated the numerical proscription rules as if they impose limits merely on the number of stations that might be owned or controlled by any one person. The fact is, however, that the numerical limits which they impose relate not merely to ownership or control but to any interest whatever, as stockholder, officer or director, subject only to the qualification that stock interests of less than 1% may be disregarded in the case of corporations having more than 50 voting stockholders. The rules thus operate to exclude an applicant for a television license if a 1% stockholder of the applicant happens to own 1% of the stock of any other company or companies interested in the aggregate in five television stations, without regard to the facts concerning control of the operation or policies of any of the stations involved. See *Westinghouse Broadcasting Co.*, 10 PIKE & FISCHER RADIO REG. 161 and 202. It would be difficult to conceive of a more extreme case of administrative capriciousness.

Accordingly, even if the Commission had predicated its action in adopting the rules upon a policy of program diversification different from congressional antimonopoly policy, such rules would nevertheless be arbitrary and capricious and therefore invalid.

C. The Numerical Proscription Rules Debase Performance of the Commission's Administrative Function.

The gist of petitioners' position in this case is that the Commission "is not required by Section 309(b) to reopen, on a case-to-case basis, the policy judgments which the rules embody." (Pet. Br. pp. 20-27).

Section 309(b), as already noted, in terms of broadest generality, confers the right to a hearing upon an applicant

to whom the Commission would deny a license. When commenting upon the duties of other administrative agencies under statutes in which Congress advisedly has left implementation of flexible concepts to the discretion of the agencies, this Court has said that such concepts are "to be defined with particularity by the myriad of cases from the field" over which the agency has cognizance. *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394. Under the licensing provisions of the Communications Act, the expertise of the Commission was intended to play continually upon the delicate function of licensing a scarce communication medium. *National Broadcasting Co.* v. *United States*, 319 U.S. 190.

While the Commission is authorized to proceed by general rule in appropriate cases, it is nevertheless true, as this Court pointed out in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203, that

> ". . . the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective."

In the present case, petitioners have urged the specialized and varying nature of the problem as a reason for a general rule, rather than case-to-case adjudication. Thus they have stated that a general rule incorporating numerical proscription of multiple ownership is necessary because of the uncertainties of case-by-case adjudication "in a realm where particular evils are not readily susceptible of proof on an individual case basis" (Pet. for Cert., p. 12). If each administrative agency to which Congress has given power

to resolve "uncertainties . . . not readily susceptible of proof" attempts to settle those uncertainties simply by announcing general rules, the rationale for creation of the agency disappears. If blocks of license applications, by unreflective decisions dictated by general rules, are to be presumed unlawful, the purpose of having a Commission is lost. If the Commission thus destroys the rationale for its creation, it may as well give way to the Congress.

POINT III

THE NUMERICAL PROSCRIPTION RULES ARE INVALID BECAUSE THEIR BASIS IS NOT ADEQUATELY DISCLOSED.

The scope of judicial review of orders of the Commission has been narrowed both by acts of Congress and by acts of judicial self-restraint out of deference for the special knowledge and expertise of the agency. *Federal Radio Comm'n* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266. But the Congress has never intended and the courts have never permitted such deference to serve as a sanction for inadequately explained agency conduct.

Section 4(b) of the Administrative Procedure Act requires that the Commission "shall incorporate in any rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 1003(b). On review, that statement becomes the touchstone against which the validity of the rules must be tested.

Recently, in *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, this Court ordered remand of a case because the Commission had not "sufficiently laid bare its mind to enable us [the Court] to perform our reviewing function." *Ibid.* at 95. Although the Commission had in its decision

contended that beneficial effects would flow from its action, it had done so "in an abstract, sterile way." *Ibid.* at 94; see also *Easton Publishing Co.* v. *FCC*, 175 F.2d 344 (D.C. Cir.); *Johnston Broadcasting Co.* v. *FCC*, 175 F.2d 351 (D.C. Cir.).

The reason set forth by the Commission in the Order to support its choice of the specific numerical limitations of the revised rules are not related to the congressional policy against monopoly or even to the Commission's diversification principle. No attempt was made to show that the specific numbers chosen bear any rational relationship to "concentration of control" of broadcasting "contrary to the public interest, convenience or necessity." No showing whatsoever was made of the manner in which those specific numbers would operate to serve the public interest.

The precise words used in the Order are as follows:

> *AM*—the number seven was selected ". . . . in order that present holdings of such stations be not unduly disrupted." (R. 26)
>
> *FM*—the number seven was selected because ". . . It is considered desirable to have the same limitation applicable to both aural services because of their inter-relationship and the present status of FM's growth." (R. 26)
>
> *TV*—The number five was continued in effect because, ". . . The attached rules continue in effect the existing limitation on TV station ownership which, in our judgment based on extensive experience with the problems of multiple ownership, have proven practicable and desirable." (R. 25)

The failure of the Commission to relate its choice of numbers to the avowed purpose of the rules results from the fact that the Commission has not made any study and

does not have any experience upon which to accomplish what courts and other administrative agencies have found impossible: the development of an inflexible numerical formula defining what in all cases will constitute undue concentration of control.*

In support of reference to the Commission's "extensive experience with the problem of multiple ownership," petitioners were able in the court below to point to only two instances of persons having interests in more than seven AM stations and to no instance whatever of ownership of an interest in more than seven FM stations or five TV stations. The FM and TV numerical limitation rules have

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*See footnote (*) at page 26, *supra*.

Petitioners imply (Pet. Br. pp. 6-7, fn. 4; p. 31, fn. 19) that in 1949, in the rule making proceeding which followed release by the Commission of its Notice of Proposed Rule Making (R. 13-14), Storer took a position contrary to that for which it now contends. The record contradicts that contention. Many interested parties filed statements in opposition to the proposed rules (R. 1-8, 16-17) and thereafter argued in opposition to the rules (R. 10-11, 12-13), taking precisely the position that Storer urges in this proceeding, *i.e.*, that the Commission is without power to make and promulgate numerical limitations upon the number of broadcast stations which can be owned and operated by any person. The spokesman for Storer joined in their objection to the proposed rules (R. 11), but urged that if the Commission should decide to set some numerical limit upon ownership, it should adopt the same limitation number for both AM, FM and TV facilities (R. 8-9, 12).

The Commission did not promulgate the multiple ownership rules here under attack until more than five years after it had proposed them and had received statements in opposition, during which time the TV industry had burgeoned from almost nothing to one that was displacing AM as the principal commercial broadcasting medium. Any suggestion in the instant proceeding that Storer should be foreclosed by the 1948-1949 rule making hearings is a distortion of the rule making function. Administrative Procedure Act, *Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 257-260; Monograph of the Attorney General's Committee on Administrative Procedure, *Federal Communications Commission*, S. Doc. No. 186, pt. 3, 76th Cong., 3d Sess. 73-80.

been in effect since the early 1940's and have precluded consideration of the question by the Commission in those services. In only one case has the Commission been faced with the question in the AM service, and in that instance its "experience" was limited to denial of the acquisition of an eighth station. *Sherwood B. Brunton,* 11 F.C.C. 407.

Although not explicitly stated, petitioners suggest (Pet. Br. pp. 12-14) that the numerical proscription rules have been a factor in promoting the growth of radio and television. But there was no numerical proscription rule applicable to AM radio stations prior to the rules here under attack. In so far as concerns FM and TV, what little evidence there is available supports the conclusion that the limitations may have stunted rather than fostered growth. There are only approximately one-fifth as many FM stations in the country as are permitted under the Commission's allocations. Since 1952, applications have been filed for only about 710 commercial television stations out of the 1,850 allocated. Moreover, there are today only about 440 such stations in operation. Since 1952, a substantial number of television construction permits and licenses have been surrendered. Most of those surrenders came because single station owners have found it economically infeasible to proceed with their plans. The Commission has been forced to acknowledge that its rule limiting ownership to five TV stations was a factor in preventing full development of UHF. It said in support of its rule change permitting multiple owners to acquire two UHF stations in addition to the five permitted VHF stations:

> ". . . the prestige, capital, and know-how of the networks and other multiple owners would be most effective in aiding UHF. We are persuaded that

> the entry of these multiple owners into such key markets will furnish a substantial impetus to UHF." FCC, *Amendment of Section 3.636*, REPORT AND ORDER, 11 PIKE & FISCHER RADIO REG. 1519, 1523.

In the instant proceeding, the Commission failed completely (1) to make any basic or ultimate factual findings or determinations, (2) to make any attempt at rational conclusions based upon any factual considerations or (3) to state clearly the basis or reasons for the establishment of the numerical limits. See *Tri-State Broadcasting Co.* v. *FCC*, 96 F.2d 564 (D.C. Cir.). In so far as the Order purports to explain the numerical limits set by the rules, the Commission has not laid bare its reasons with sufficient clarity to permit the Court to perform its reviewing function. *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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